166-701

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 103.

SPRINGVILLE CITY, PLAINTIFF IN ERROR,

vs.

PERRY A. THOMAS AND LOVINIA THOMAS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED APRIL 30, 1894.

(15,584.)

[illegible]

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INDEX.

	Original.	Print.
Caption	a	1
Transcript from district court	1	1
Complaint	1	1
Answer	4	2
Verdict	7	3
Judgment	7	3
Order that judgment be reduced or a new trial granted	9	4
Consent to a reduction of judgment	9	4
Statement on motion for new trial	10	5
Evidence for plaintiff	10	5
Testimony of Lavina M. Thomas	10	5
David Fordonski	15	7
Perry A. Thomas	19	9
Joseph Whitehead	24	11
John Dallin	28	13
George Storrs	33	15
Marilla Fuller	36	17
Miranda Fuller	38	18
Mrs. —— Fuller	39	18
Dr. —— Warner	40	19
Mrs. Lavina Thomas (cross)	42	20
Plaintiff rests	42	20

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	Original.	Print.
Evidence for the defendant	43	20
Testimony of Edwin Lee	43	20
R. A. Deal	45	21
Eugenia Monger	49	23
Alexander Robertson	51	24
Joseph Stevenson	52	24
James E. Hall	52	25
Mrs. Thomas (cross)	55	26
Mrs. Ella Deal	55	26
Mrs. Mary Mendenhall	56	26
Evidence for plaintiff in rebuttal	57	27
Testimony of Mrs. Thomas	57	27
Mrs. Fuller	58	27
Evidence for defendant	59	28
Testimony of R. A. Deal (recalled)	59	28
Defendant's requests for instructions	59	28
Charge to the jury	61	29
Objections to verdicts	65	30
Specification of errors of law	66	30
Specification of particulars in which the evidence is insufficient to justify the verdict	70	32
Stipulation as to statement	72	33
Judge's certificate to statement	72	33
Stipulation as to undertaking on appeal	72	33
Notice of intention to move for new trial	73	34
Notice of appeal	74	34
Consent as to transcript on appeal	75	35
Argument and submission	76	35
Judgment	76	35
Order denying rehearing	76	35
Opinion	77	35
Writ of error	80	37
Citation and service	81	38
Assignment of errors	82	39
Bond	84	40
Clerk's certificate	86	41

a In the Supreme Court of Utah Territory.

PERRY A. THOMAS and LAVINA M. THOMAS, Respondents,
vs.
SPRINGVILLE CITY, Appellant.

Transcript on Appeal.

Endorsed: #417. Filed in the supreme court Aug. 11, 1893, at Salt Lake City, Utah. Jos. P. Bache, clerk, by John C. Shipp, dep. cl'k.

1 In the First Judicial District Court, Utah County, Utah Ter.

PERRY A. THOMAS and LAVINA M. THOMAS, His Wife, Plaintiffs,
vs.
SPRINGVILLE, a Municipal Corporation, Defendant.

Now comes the plaintiffs in the above-entitled cause and complaining of the defendant for cause thereof alleges:

1. That plaintiffs were married to each other on March 7th, 1892, and ever since have been and still are husband and wife.

2. That the defendant is and at all times hereinafter mentioned has been a municipal corporation organized and existing under and by virtue of the laws of the Territory of Utah.

3. That the said city is, and at all times herein mentioned was platted into blocks and streets over which said streets the
2 said city exercised control and is charged with the duty of keeping in repair and in a safe and passable condition.

4. That on the 16th day of June, 1892, and for a long time prior thereto, there existed upon and across one of the said streets of said city, to wit: Lincoln street, sometimes called Center street, a deep, wide and dangerous channel having perpendicular side walls, for the depth of about eleven feet; that over and across said channel, and in the said street, at the said date, and for a long time prior thereto, there was and had been a wagon bridge, which the said city had carelessly and negligently permitted to remain, and the same was on the said day in a dangerous condition, being wholly unprotected by railing or otherwise for a considerable distance on each side at each end, and that the sides of the said channel at each side of said bridge were also on the said day, and for a long time prior thereto, permitted to be and remain in a dangerous condition, and wholly unprotected by railing or otherwise.

That a short time prior to the said day the floor of said bridge had become old and worn and at one place a large hole had been broken through the same. That the said city had permitted the said hole to be repaired in a careless and negligent manner by permitting a large, thick slab to be nailed upon the said bridge which

only partially covered the said hole and which was an object
3 of fright and terror to horses even of the gentlest kind, driven across the said bridge.

5. That on the said 16th day of June, 1892, the said plaintiff, Lavina M. Thomas, was traveling with a horse and buggy across the said bridge and along said street, that the said horse which said plaintiff was driving became frightened at said slab and became unmanag-able and backed the said buggy with the plaintiff therein rapidly over the side and end of the said bridge and precipitated the said plaintiff with the said horse and buggy over the side and end of said bridge into the said channel, a perpendicular distance of eleven feet.

That the said horse was gentle and well trained to drive.

That said accident was wholly without fault or negligence on the part of said plaintiff and was occasioned by the neglect and careless disregard of the duty of the said city in the premises by permitting the said channel and bridge to be and remain in the condition hereinbefore set forth.

6. That the said plaintiff at the time of said accident was pregnant and sustained serious bruises and injuries, so that by reason thereof she suffered greatly, and finally, by reason thereof, on August 2d, 1892, she was prematurely delivered of a dead child.

4 Wherefore plaintiffs pray judgment against the defendant for the sum of $5,000.00 and for costs of suit.

THURMAN & SUTHERLAND,
Attorneys for Plaintiff.

Title of Court and Cause.

Answer.

Said defendant for answer to the complaint herein, denies that over or across said channel mentioned in said complaint, or on the street mentioned at the time stated in said complaint or at any other time, there was or had been a bridge which the said city had carelessly or negligently permitted to remain, or that the same was on the day mentioned in said complaint, or at any time, in a dangerous condition, or wholly or at all unprotected by railing or otherwise for a considerable or any distance on each side at each end or at all, or that the sides of the said channel at each side of said bridge were also or at all on the said day or for a long time or any time prior thereto permitted to be or remain in a dangerous condition, or wholly or at all unprotected by railing or otherwise.

Said defendant further denies that at the time mentioned in said complaint or during any time, the floor of the said bridge
5 had become or was old and worn, or at any place therein a large hole had been broken through the same; or that the said city had permitted the said hole to be repaired in a careless manner by permitting a large, thick slab to be nailed upon the said bridge or otherwise, which only partially covered the said hole, or

which was the object of fright or terror to horses of any kind driven across the said bridge, or otherwise.

Said defendant, according to its information and belief, denies that on the said 16th day of June, 1892, or at any other time, the said plaintiff, Lavina M. Thomas, was lawfully or otherwise traveling with a horse along said street or across said bridge, or that said horse which said plaintiff was driving, became frightened at the sight of any slab or became unmanageable, or backed the said buggy with the said plaintiff therein rapidly or otherwise over the side or end of the said bridge and precipitated said plaintiff with the said horse or buggy over the side or end of the said bridge into the said channel, a distance of eleven or any number of feet, or at all, or that the said horse was gentle or well driven, or that the said accident was wholly or at all without fault or negligence on the part of said plaintiff; or was occasioned by the neglect, careless or any disregard of the duty of the said city in the premises by permitting the said bridge or channel to be or remain in the condition mentioned in said complaint, or otherwise, or that the said plain-
6 tiff at the time of the alleged accident was pregnant, or sustained serious or other injuries or bruises, so that by reason thereof or otherwise she suffered greatly or at all, or that finally, by reason thereof at the time mentioned in said complaint, or at any time, she was prematurely or at all delivered of a dead child.

Said defendant further denies that by reason of the premises or otherwise, plaintiffs, or either of them, have suffered damage in the sum of $5,000.00 or in any sum whatever.

And for further answer to said complaint, said defendant alleges that the injuries received by said plaintiffs or either of them, if any, were due to their own fault and negligence directly contributing thereto, and not by any fault or negligence on the part of said defendant.

Wherefore said defendant prays to be hence dismissed with its costs.

RAWLINS & CRITCHLOW,
D. C. JOHNSON,
Attorneys for Defendant.

7 Title of Court and Cause.

Verdict.

We, the jury empanelled in the above-entitled cause, find for the plaintiffs and against the defendant, and we assess the plaintiffs' damage at $2,300.

C. A. GLAZIER, *Foreman.*

Concurring: C. A. Glazier, Chas. F. Watkins, F. S. Humphries, James Clark, H. W. Davis, C. H. Karen, Joseph Kelly, W. H. Brereton, W. H. Patten.

Dissenting: Alexander Ellis, Chauncey E. Thomas, Jesse Knight.

Filed February 15th, 1893.

B. BACHMAN, *Clerk.*

Title of Court and Cause.

Judgment on Verdict in Open Court, Feb. 15, A. D. 1893.

This action came on regularly for trial. The said parties appeared by their attorneys, Thurman & Sutherland, counsel for plaintiff, and Rawlins & Critchlow and D. C. Johnson for de-
8 fendant. A jury of twelve persons was regularly empanelled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names, and on their oaths say:

"We, the jury empanelled in the above-entitled cause, find for the plaintiffs and against the defendant, and we assess the plaintiffs' damages at $2,300.

C. A. GLAZIER, *Foreman.*"

Concurring: C. A. Glazier, C. F. Watkins, F. S. Humphries, C. H. Karren, James Clark, Jos. Kelly, H. W. Davis, W. H. Brereton, W. H. Patten.

Dissenting: Alexander Ellis, Chauncey E. Thomas, Jesse Knight.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is therefore ordered, adjudged and decreed, that the said Perry A. Thomas and Lavina M. Thomas, his wife, have and recover from the said Springville, the sum of two thousand three hundred ($2,300.00) dollars, with interest from this date at eight per cent. per annum, together with said plaintiffs' costs and disbursements incurred in this action, amounting to the sum of
9 one hundred and fifty-four ($154.25) dollars and twenty-five cents.

JOHN W. BLACKBURN, *Judge.*

Judgment recorded the 15th day of February, A. D. 1893, in Book 3, page 19.

Title of Cause.

Order.

These causes coming on for hearing before the court on the motions for new trial filed therein, and the court being now fully advised herein, orders that upon the judgments herein being reduced $1,000.00, that the motion for new trial be overruled, otherwise that a new trial be granted in said cases. It is further ordered that plaintiffs have to and including May 17th, to accept or reject the same.

(Signed) JOHN W. BLACKBURN, *Judge.*

Dated May 10th, 1893.

Title of Court and Cause.

Now comes the plaintiffs herein and consent that judgment
10 rendered herein on February 15th, 1893, in favor of plaintiffs and against defendant, be reduced to $1,300.00; making a reduction of $1,000.00 on said judgment.

THURMAN & SUTHERLAND,
Attorneys for Plaintiffs.

Dated May 15th, 1893.

Endorsed: Title of court and cause. Certified copy of judgment-roll. Filed February 18th, 1893. B. Backman, clerk, by F. Bachman, deputy clerk.

Title of Court and Cause.

Statement upon Motion for New Trial and upon Appeal.

This cause came on regularly to be heard before the court and a jury on the 13th day of February, 1893, and by agreement of counsel both causes were tried and submitted to the jury at the same time. On the trial of said causes, the following testimony was introduced and proceedings had:

LAVINA M. THOMAS, one of the plaintiffs, testified as follows:

"I was injured at Springville on June 16, 1892. I was
11 driving from the east to the west, and I crossed the bridge; got across it, and I thought, pretty near, and the horse stopped right on the bridge and shied off, and I spoke to him and told him to get up, and he would not, and I hit him with the whip, and spoke to him again, and he kind of reared up and backed. It didn't seem like he went back a step until he was off. I was trying to make him cross. Was not pulling on the lines nor excited. I hadn't seen the place to notice it. The fall mashed the buggy and hurt the horse, it cut him up some, and he acted as if he was a cripple when they took him out. I did not see anything on the bridge to frighten the horse until after. It seemed as if the horse was looking at something right at his feet. He shied and looked down. The object which he looked at appeared to be a new piece of plank nailed on the old bridge, and left a hole on the east side of the plank, I should judge, two or three inches, so that I could see the water through. I did not appear to be hurt at the time. Just as quick as the buggy turned and cramped as it was going down, I fell out, and my two sisters sitting in the buggy were thrown, the one over the top, and the other one was still on top of the buggy. I got up myself and went and caught the horse by the bit, and some one came and took the horse away from me. I fell out down in the creek. The point where I fell was about ten or eleven feet, according to my judgment. There was water and rocks
12 there. The water was from a foot and a half to two feet deep. I fell kind of to the side. I didn't feel that I was hurt until about half an hour afterwards; then I began to have pains. I first felt

these pains at the justice of the peace's house. Had never felt that kind of pain before. Was married on the 17th day of March, 1892. Was well up to the time of the accident. From that time on I was sick all the time. About every day I would have awful pain; serious pain, until I was sick on the second of August. Then after that I felt better. Was delivered of a dead child on the second of August. During my sickness I was at Springville and at home at Spanish Fork, during the six weeks. Was under treatment. My mother took most of the care of me. I have been better since the second of August, but not as well as before the accident occurred. I had a similar occurrence happen on the last day of October, as I did on the second day of August. Previous to my marriage on the seventeenth day of March, I had lived in Springville; was born there, and was thoroughly familiar with the city. Since June 16, have lived in Spanish Fork and have kept house. My husband and myself lived alone, when we didn't have a hired girl. Between June 15 and August 2, I lived with my mother most of the time in Springville. Some of the time I was home. While at home at Spanish Fork I kept house. From August to the present time I have kept house in Spanish Fork.
13 No one is in our family besides myself and husband. The horse that I was using belonged to my husband. He had it before I married him. I had driven him between the time of our marriage and the accident frequently, and was accustomed to driving horses. We were going from the east toward the west across the bridge. It was a single buggy with one seat; a top buggy. I was sitting on the right-hand side, holding the lines. I didn't notice the bridge particularly; never had my attention called to it until after the accident. I had driven across it, I suppose, many hundred times. I don't remember, because it is a very common occurrence for me to cross that bridge. I was not expecting anything to happen, and paid no attention at all to the distance that I got across the bridge. There was plenty of room; the bridge was wide enough to drive over without driving into the railings or supports on either side. The first thing that called my attention to anything unusual, the horse began to back. By shying, I mean looking at it. I didn't know what. I supposed he saw the water through the hole. The board was on the right-hand side of the middle of the bridge. I guess it would be in the middle of the bridge. It was on the east side of the bridge. We had gotten almost across the bridge, but the horse began to stop. The hole was about five feet I should say from the west end of the bridge. When the horse stopped I whipped him; he kept looking at the place until
14 he reared up and backed off. I kept on trying to get him across by whipping him and speaking to him. I thought I could get him across if I kept on whipping him. He kept on backing and I didn't think about the end of the bridge. I didn't try to get him to stop but to go ahead. He seemed to go back quite fast. The carriage cramped just as it went off. I fell off to the edge of the bridge where it is rocked. I fell out on the right-hand side of the buggy. I went to the horse's head and held it up

after the buggy had fallen down. I went to examine the bridge just as quick as I could get out of the creek. I went alone; there were folks on the bridge. I should judge the hole was ten or eleven inches wide, and had been covered up with a six-inch plank; a two by six. That would leave a space of two or three inches here on the east side, and a similar one here on the west side. The hole was about four or five inches long. I don't know what the material of the bridge was. I think two or three boards were broken out, which caused this hole. I think they were boards set up on edge. Mrs. James attended me on the second of August; she resides at Spanish Fork. My sister-in-law, Mrs. Brockbank, was there. I had another miscarriage in the latter part of October, and have felt a great deal better since the second day of August. Dr. Warner attended me, he resides in Spanish Fork. It took about time enough
for the back wheel to turn round from the time the
15 horse got frightened until the buggy was off in the creek;
not more than a minute. I didn't have time to think about anything particularly. There were a lot of people on the bridge talking. They were as excited as I was. They were looking at the place where the horse scared and the buggy. The buggy dropped from the top to the bottom of the channel. (Witness indicated on diagram where the buggy fell off.) The horse seemed to be looking towards his feet. I afterwards saw the hold where he appeared to shy from. There is a space of two or three inches on the east side of the board, and not more than one inch on the west side. I have been accustomed to driving horses since I was a little girl. The horse was of good disposition and gentle; had never shied with me before. I didn't observe whether I went off the bridge or off the approach, as I went off. I could tell afterwards, when we got up, where we fell off. Both wheels went off the bridge. There was no railing or guard at the place where we went off. There was nothing to prevent a vehicle from going off.

DAVID FORDONSKI, sworn for plaintiff-, testified as follows:
I live in Springville and am acquainted with the plaintiffs. I saw
Mrs. Thomas on the 16th of June, last year. Was on the west
16 side of Main street, probably three hundred feet from the
bridge, maybe farther. I could see a party driving on the bridge with a buggy. Saw two ladies. I saw the horse stop at once, but could not tell how far the buggy was to getting off the bridge. Could not tell the distance. All at once, the horse stopped and commenced to shy at something, and commenced backing backward, and when they got near that place, I commenced to holler, because I expected that they would run into that creek. I commenced to holler for help, and parties went there in the meantime. I hollered and they screamed. I could not tell you how they fell in. Could not see them fall. I went over there and saw the top of the buggy was off, and one of the hind wheels broke. The horse looked down when he shied; he was facing west. I should say about four or five minutes elapsed from the time I first saw the

horse shy until he went over; it took that long to back round in that place.

(Witness then indicated to counsel, who was holding a watch, that the time which elapsed was something over one-half of a minute.)

I couldn' tell exactly the time. I noticed the condition of the bridge; that diagram represents it exactly. There is a railing on each side of the bridge except three or four feet on each side of the bridge—there is a railing that extends the whole length of the main bridge. There is no railing on the approach to the
17 bridge. Couldn't tell from that distance where the buggy fell off. It feil clear down into the creek, and was in the creek, right in the water, when I got there. Mrs. Thomas was outside of the water; didn't notice whether she was down in the creek. A new piece of plank covered a hole in the bridge; the board was about ten inches wide, and about four or five feet long. The hole was not covered entirely, you could see the water through it. The board was from an inch and a half to two inches thick, it came up half an inch above the regular floor. It was laid on top of the other boards. The channel below the bridge is about ten or eleven feet deep; it is of rock. The bridge is supposed to be half a block east from Main St., Springville. I suppose it is in the centre of the city; am not much acquainted with the streets around there. The business houses are on Main St., and this bridge is half a block east. It is about half a block, or a little over, from the city hall. There is no rail or guard on this bridge from here (indicating) on up to the end of the bridge itself, or along the bank of this approach. Nothing to prevent vehicles going over, except rocks and the rocks are not put in the form of a wall to prevent vehicles going over. There is nothing above the level of the ground to act as a guard.

Cross-examination:

18 I was about three hundred feet away when this happened; was probably the distance of a block away. The railing comes within three or four feet of the end of the bridge. The horse went off on the southeast side; when I got there the buggy was in the creek. The horse was coming from the east, towards the west. The plank was about seven or eight feet from this end of the brid-e. The lady was quiet, sitting in the buggy, while the horse was backing. When I got to the bridge, the horse was out in the water; they took her out from the water. I didn't get there until after they got the horse out of the water. The board over the old hole was about ten inches wide. I hadn't seen the hole before that board was put down. I think this ten-inch plank was champered off on both edges, but I don't remember about the ends. It was about half an inch higher than the regular boards. By looking close you could look down and see the water on one side. Would not have to look particularly close. The space through which you can see the water was probably an inch wide, more or less. The ladies were not laughing or talking;

just driving along. Couldn't tell who was doing the driving, but saw some lady lifting both the lines and trying to make the horse cross the place. I didn't hear them laughing, and didn't tell Mr. Johnson they seemed to be laughing.

Redirect examination:

19 They were lifting up the lines and striking the horse with them until the buggy went off. It was about twenty feet from the back end of the buggy to this sloping top, at the time the horse was scared. I judge the horse and buggy was about fifteen or twenty feet long. I think it is longer than twenty-three feet to the end of the bridge. The board was laid right on top of the bridge. When I spoke of it being half an inch above, I meant the champered edges.

Recross-examination:

When the horse stopped, it must have been about six or seven feet from the end of the buggy to the end of the bridge. The horse had six or seven feet to cross over to be off the bridge. I should judge it was about fifteen feet from the hind end of the buggy to the end of the bridge when the horse stopped. I was straight on in a line 300 feet away. I couldn't tell, except by estimating afterwards, how far it was from the hind end of the buggy to the end of the bridge. From what I could see at a distance, I gave my nearest guess at it. At the time this happened, I was in the west end of town, sitting in front of a store; there used to be a saloon there. It belonged to a fellow named McAuley.

PERRY A. THOMAS, one of the plaintiffs, testified as follows:

20 I am the husband of Lavina M. Thomas. I saw the condition of the bridge the evening of the accident. I was not there at the time of the accident. I measured the length of the bridge proper; its length is thirty-four feet. The east end of the bridge that is ung-arded measures four feet and two inches. There is no guard or railing there. I measured on the southeast corner of the bridge. It was eight and a half feet from the top of the floor down to the top of the water. There is a foot of water or a little over. That would make it about ten feet. There were no railings or guards upon the approaches to prevent vehicles from going over. There was a wall there for about ten or fifteen feet. There was a wall supporting the bridge, graded down level with that, and a little lower than the road is. It is what engineers call a retaining wall; it was straight up and down. I saw where the bridge had been repaired; from that place to the east end, southeast corner, was twenty-five feet. That is practically from the brace on the west end to the foot of the brace on the east end; that is, from the hole in the bridge to the foot on the east end. That hole is about even with the brace here (indicating). I am the owner of the horse and buggy, and have taken measurements of the horse and buggy as they stand hitched up; its length is about fifteen feet. The buggy was a total wreck after it had dropped over the bridge.

One wheel was broken, the top part of it was broke, the box
21 was broke, the axle was sprung, and the reach and the shafts were broke. It was a new buggy; I had had it just a couple or three weeks. Its value was $110.00; after the smash-up it was worth about $20.00. To repair it would cost the price of a new buggy. Before the accident the horse was worth $125.00. He was cut up in three or four places by the accident, and was quite stiff the next morning, and for a week or two; but he is all right now. Since that time he has been awfully skittish; he will jump sideways at any little thing he sees. After the accident, his market value was about $50.00 or $75.00. The hole was about three feet long, and about ten inches wide. A 2 x 6 plank was put on top of that, and didn't cover the hole over. It left a space there that a horse could see through into the water, about two or three inches on the east side, and about an inch on the west. I looked through the hole myself at the time. At the time of the accident, when I got over there to where my wife was, she was in bed and complained of having pains, and from that time to the 2nd of August she continued to have pains, when she gave birth to a child. (Defence excepts.) She has made complaint of pains; she complained on the 2nd of August. On that day she had a miscarriage; the child born was dead. The same thing happened on the 31st of October. Since the 16th of June, her general health has been poor. She
22 has been worse since the 16th day of June than she was before. I took the width of the bridge; it was sixteen feet. This approsch or retaining wall here (indicating) was ten or fifteen feet long; there was no guard or railing there. I didn't notice the marks of the buggy, or anything of that kind.

Cross-examination:

This retaining wall is a part of the road for a ways. The road does not extend up the creek, but the wall does, for a few feet, then it comes out two feet straight, and then makes a turn. The retaining wall runs straight with the river; there is no road down there, and a team can't get down there. I made these measurements last week some time. I saw my wife a couple of hours after the accident at Springville. The horse may be a little stiff from the accident yet, in the knees of the right hind leg, and the right front leg. He can walk along all right, and I guess he could run. The horse is a little bit stiff yet, but he isn't so stiff as he was at the time. I use him for a driving and team horse. I never had that buggy fixed, and never hitched the horse up to it again. I know it takes fifteen feet to cover horse and buggy because I bought another buggy just like it, and measured it. Didn't measure this one. I swore to the complaint in this action, and knew the facts in regard to the horse at that time a little
23 better than I do now. I stated there that I was damaged in the sum of $200. I calculated that my damage on the buggy was $110. I paid that much for a new buggy, and this is worth nothing. I testified that it was worth $20; a man could sell the

other two wheels. The buggy was an absolute wreck, and not worth a thing to me, although I might sell the wheels for $20. If the buggy was damaged $110 and the horse $50 to $75, that would make from $160.00 to $185.00. I swore in the complaint that I was damaged $200.00. I heard Mr. Thurman's statement to the jury this morning that the damages were not as great as thought at the time the complaint was sworn to. I might have told him that; I don't know as the horse is damaged quite as much as I thought he would be. My wife was perfectly healthy and never sick up to the time of the accident; she never complained of any sickness at all. Between the 2nd of August and the 31st of October she complained some of sickness. After the 2nd of August she was sick for a while, then felt all right. Afterwards she had pains again, up to the 31st of October. After that she was not altogether all right, she has the same complaint. The hole was about ten inches wide; I never measured it, I only guess it is that wide. I guess the board that covered it was four or five feet long, and six inches wide.

The aperture between the edge and the boards on the east
24 side was two or three inches, and on the other side, about an inch.

Redirect examination:

Before the accident, the horse was quiet and gentle. I raised the horse; had known him for eight years. Never knew him to be frightened before.

JOSEPH WHITEHEAD, sworn for the plaintiffs, testified as follows: I live in Springville, was there on the 16th of June last. I saw the accident immediately after it was over. At the time of the accident I was about one hundred yards from the bridge, but not in view of it. My attention was attracted by Mr. Fordonski hollering for help, and I ran around that way. Fordonski was across the creek from where I was, in front of McAuley's saloon, walking toward the bridge. I then went over to the bridge and found the horse and buggy and three girls in the creek. They were in the creek here, (indicating,) in the water, right close to the retaining wall. The horse was on his feet in the water. There were several there at the time. I noticed the condition of the buggy. It was smashed up some; one wheel was broke and the top broke off. I didn't notice the shafts; it seemed to be broke up pretty bad. I noticed the plank on the bridge. I saw

it myself. I should judge it was here somewhere, (indicating,)
25 about in the center and to the west side, about four or five feet from the west end of the bridge. The plank was new about eight or ten inches wide. It was easily distinguishable from the other boards, because it was new and the color was different. It was about four or five feet long I should judge. It was a piece of two-inch plank, bevelled off at the ends and sides a little, and nailed down there. The two inches stood above the floor of the bridge. I don't know that the plank covered the hole entirely; I don't hardly think it covered the entire hole. I don't believe there was much space there. I had seen the plank before; it had been

on the bridge to my knowledge two or three days. I seen it many times as I crossed the bridge.

Q. I will ask you to state to the jury whether or not you had known of any horse being frightened there.

Objected to by defendant as being irrelevant and incompetent for the reason that no negligence was claimed on account of want of repair of bridge or of negligence in making repairs, or in placing piece of plank on bridge. Objection overruled by court. Exception by defendant.

A. Yes, sir. I had known of one a few days previous to that.

Motion by defendant to strike out answer as incompetent and irrelevant. Motion denied and exception by defense.

26 The horse was my own, I was driving him and he was frightened at the plank. He went over after I used the whip on him. He seemed to be afraid of the plank, afraid to cross. His disposition was kind and gentle, not in the habit of getting frightened easily.

All of the above testimony of witness as to the actions of his own horse and his disposition objected to by defendants, and motion made to strike out as immaterial. Objection overruled and motion denied. Exception by defendant.

When I got over there at the time of the accident, I noticed the marks of the buggy wheels where it had gone over the bridge. I observed the mark where it hit this (indicating brace) on the inside; just glanced off one wheel and went over the bridge here—first struck the brace and glanced off. Where the inside wheel went over the bridge is about midway between the end of the bridge and the brace; it may be a little nearer to the outside of the bridge than inside. The other wheel went over on the rocks. The depth below the bridge is about eight or nine feet, I should judge. The bed of the channel is composed of medium-sized cobble rock.

Cross-examination:

At that time the roads were dusty. There was a good deal of travel over the bridge, we don't I think sprinkle the streets by that bridge. The dust was pretty thick; there was some dust on
27 the bridge; naturally the dust would work over on the bridge. I saw buggy tracks along through the dust running along through there (indicating); it was from the center of the road going back that way.

The buggy commenced to cramp on the bridge, as I saw by the tracks. The dust was thick enough so that you could follow the track; we followed the track along the road from where the horse stopped to where it went over the bridge.

Q. And you can't give any other idea to this jury?

The COURT: There is no occasion for giving any other reason.

Mr. CRITCHLOW: I think there is. I don't care to disclose it at present.

The COURT: I don't think there is.

Exception by counsel for defense.

I am accustomed to cross this bridge frequently, four or five times a day. I am clerk in a store; I walk and drive backward and forward over that bridge quite often. The hole had been there I should judge, about two days before the plank was over. I drove along there with my horse; he shied at the hole; after the plank was put down he shied at the plank. One of the wheels struck the brace here (indicating), then I saw the mark where it went over the bridge. I saw the mark of another wheel going over there.
28 The other two wheels followed over; not exactly in the tracks of these. I saw the tracks of four wheels; all four of them did not go over between the brace and the end of the bridge; the two nigh wheels went off the bridge between the brace and the end, and the other two went over the rocks. When I saw the buggy it was turned on its side, and the front of the buggy faces upstream. The horse was in the creek, above the buggy, standing up, loose from the buggy. I ran as fast as I could from three hundred feet away. Mrs. Thomas was in the creek; I remember she was standing up in the creek, but I don't remember whether she had hold of the horse's head or not.

Redirect examination:

I am well acquainted in Springville; the bridge is somewhere near the center of the town; right close to the business portion, about a block from the city hall; but if you count from the street, the corner of the hall yard, it's only half a block and across the street.

Recross-examination:

At that season of the year a great many teams and single horses go over that bridge in a day. It is the main road to the canyon and the big fields.

JOHN DALLIN, for the plaintiffs:

29 I reside at Springville; have resided there since 1856. I know the bridge in dispute and remember its condition just before the accident. I had occasion to hook up my horse and buggy nearly every day, perhaps once or twice some days, and go to the train to send supplies to Helper, and in crossing the bridge one day there was a big hole in the bridge. I suppose the hole was six, seven or eight inches. The scantling of the bridge was two by four set on end, and some horse or something had stepped through the bridge and broke out about three or four of them and left a hole there. While I was out I drove up around town to find the supervisor. I learned from the people in town that he was out to his farm, out of town. I learned who his deputy was in his absence,

and I went out to his deputy, Mr. Lee, and says I, "Mr. Lee, I would like to call your attention to the bridge." I says, "You will have to pay for some person's broken-legged horse if it is not repaired; it's very dangerous crossing over there—bad indeed. Please attend to it." There was a clump or slab or something of the kind thrown across this hole; it didn't fill the hole. The hole in the bridge where this slab was put on—the bridge here for about two feet or two and a half feet all around here had the dry rot, and the centre of this hole, I should judge, a horse or a man or something had stepped on it and split the first hole out, and then afterwards, by this information I gave them, he came down and put this stuff on here; a piece, I should judge—I thought,
30 in my estimation, it was similar to a slab, a big old slab cut in two, and it would make a straight edge on one side and a bevel on the other. That was placed on over this hole, and I recollect crossing when my horse shied at it, before the hole was fixed and when this slab was put on. It would be impossible to cover the hole here with even a foot slab, for this bridge as I say was rotten here for two feet and a half, and in putting on a slab of that kind and partially covering the hole, even the hammering of the nails there would shake the balance of this down and form a hole anyway. There was a hole there after the slab was put on. I live just across a four-rod street and half a lot—about nine or ten rods from the bridge. I was standing in front of my house out in my garden, and I heard some one screaming, and I looked over and I saw some parties on the bridge, and I ran. I had a hoe in my hand, I was in the garden doing a little gardening. I ran down there, and I came right up to the bridge in this position. I came here first, I came here and looked over and took in the sight here; then I came on further and looked down, and here was the horse and buggy down here in the creek; then I passed over here and waded into the creek over my boot tops, and this lady, Thomas, was in the creek standing to the head of her horse, and I hurried into the creek, supposing that the horse would rear right over her, and I says, "Madam, you had better get out of this and let me
31 attend to the horse." So I walked her out to save her from getting hurt, and while I was getting the lady out another gentleman, Mr. McDougal, came in from the east side of the creek, and jerked the horse and buggy out on the east side. After this occurred I went up to the bridge. Right over the brace right here was a wheel mark, just a light impression with dust and all I noticed—well, I noticed on the bridge where the horse had backed, and the wheel had struck here on this brace and gone over, fell right down here in this creek. It was right down here. The buggy was lying—a portion of the buggy would hardly extend to the centre of the creek, but some little distance from this upright wall; the horse was standing a little more cattering this way and upstream, which the horse would reach a little farther over than the center of the stream. I looked at the buggy, but never thought of taking the damage into consideration, but I considered it to be a total wreck. It was badly smashed up.

Cross-examination:

I have nothing against the defendant; there have been some prosecutions against my business. I have been prosecuted a number of times by the city for selling liquor without a license, but there was never any proof of that kind. I don't know why I should bear any malice against the city. The bridge was badly af-
32 fected with the dry rot; it was dangerous to hit the bridge with a hammer where it had dry rot and was crumbling. When they put this other piece in to repair it, they may have knocked out another rotten piece; I don't say that they did knock out any other piece; I don't know how many pieces were taken out of there. After the accident occurred I didn't take a great — of notice of it. I looked at the bridge and looked at this wagon mark on the end of this brace. I saw where the wagon wheel went over. It may not have been that same buggy, but it is to be supposed that it was, because there was the buggy right down under it. I actually saw a wagon-wheel mark running right over the brace where a wheel had evidently gone over the bridge and into the creek. That mark is all I saw. I didn't notice where the wagon wheel had hit the brace and glanced off and then gone off down here; if it had been there I might have noticed it. From the end of the brace here to the end of the bridge, I should think was three feet and a half; I should think it would be about four feet. One wheel went off right at the point of the brace. I don't know whether this was a wide or narrow *guage* buggy; I didn't observe it. I don't know the *guage* of a wide track. Supposing four feet six and a half to be the standard *guage*, then the other wagon wheel would go off on the end of the bridge. The horse must have fell right over the buggy. The horse was up-
stream and the buggy below it. It looked to me like the
33 horse lunged right over on its back. (To counsel for plaintiff-:) It has been fifteen or twenty years since the city and I had our difference.

GEORGE STORRS, for the plaintiffs:

I reside at Springville, about six or eight rods from the bridge in question. I was well acquainted with its condition at the time of the accident; there was a plank nailed over a hole in the bridge. As to its being guarded by a railing over the bridge proper, it's about the same as this here (indicating) represents; there was no railing at the bridge except this part here. I guess this plank was put on some two or three days before the accident.

Q. Did you see any horses shying on that bridge?

Objected to by defendant as irrelevant, immaterial and incompetent under issue in this cause. Objection overruled; exception taken.

Yes, I have seen horses shying on that bridge both before and after the board was put on.

Q. About how many would you say you saw after the board had been put on?

Same objection; no ruling; exception taken.

I might have seen two or three, I guess, shy at the place. They seemed to shy at that plank that was put on. I didn't see any horse shy there that day before the accident; I wasn't there
34 at the time of the accident; I was uptown. Didn't call the attention of any authorities to the bridge. A new floor has been laid entirely since the accident occurred.

Cross-examination:

After this plank was put on the hole, I didn't see any necessity for calling the attention of any of the authorities to the bridge. I don't know whether those horses I spoke of shyed because the plank was there or because they remembered that there was a hole there. A horse having once observed a hole in the bridge or anything of that kind, the next time he comes along within a short period he will look for it and avoid it. Ordinarily reasonable horses would take care not to get in the hole. I do not know that any preparations were being made at the time of the accident to put a floor on the bridge.

Redirect examination:

Q. You say that after this plank was put on the hole you didn't consider there was anything to call the attention of the city authorities to—anything dangerous?

A. Well, I supposed there was after that accident, but I didn't think there was anything before.

Defendant moves to strike out as incompetent and immaterial. Motion overruled; exception taken.

35 Q. You say you didn't call the attention of the city authorities after?

Defendants object for same reason as above; motion overruled; exception taken.

A. No, sir; I don't recollect saying anything to them about the plank afterwards.

Q. I will ask you this question to refresh your memory: Whether you didn't have some conversation about this very matter with Mr. Lee, the deputy supervisor, by way of calling his attention to it, before the accident?

A. Before the plank was put on?

Q. After the plank was put on.

Objected to as immaterial, irrelevant and incompetent. Objection overruled; exception taken.

A. I don't recollect of having any conversation with Mr. Lee in regard to the plank.

Q. Did you call the attention of your son to it, who is the supervisor of the city?

Same objection; same ruling; exception by defense.

A. My son wasn't at home at that time, not when the plank was put on; he had gone south.

Q. Do you remember having a conversation with me at your office?

A. Yes, sir.

Q. In Springville?

A. Yes, sir.

36 Q. Do you remember stating to me there that you had called the attention of your son to the condition of the bridge after the plank was put on; that it scared horses—frightened horses?

Same objection; same ruling; exception by defense.

A. I don't recollect if I did; not in that particular. I might have spoken to him about horses being scared at the plank. I saw several horses get scared; I have seen them shy there at the bridge, there at the plank.

Q. That plank there, the way it was put on, state whether it was to any extent an obstruction to travel.

Objected to as immaterial, irrelevant and incompetent. Objection overruled. Exception by defense.

A. It might be to some animals, and some it wouldn't. I don't think it was any obstruction any way to travel. The bridge is used as a footway, as well as a wagonway.

Recross-examination:

It was a two-inch plank; I don't remember whether it was champered down, or not. I think there was a great deal of dust there at the time.

MARILLA FULLER, for the plaintiffs:

37 I am a sister of Mrs. Thomas and was with her in the buggy on the occasion of the accident. We were going along slow. I didn't think of the horse getting scared; and when we came to the middle of the bridge the horse began to shy before I saw the plank as I sat in the buggy; the horse began to shy around, and she tried to coax him across, and then tried to whip him across, but he wouldn't go. Then we was gone down in a few minutes; it didn't seem like it was a minute; there wasn't time to think about anything. That place looked like a piece of plank; about two inches I guess; about that. From where I sat I saw nothing else besides the plank; it didn't fully cover the hole, for I looked at it after we went down in the creek. If this is the place here (indicating) I think we went over right here. The left wheel was here, I think, and about here we went straight in the water. I think I fell over the top of the buggy; I was under the buggy in the creek. I didn't have time to see how the others fell.

Cross-examination:

I was sitting on the left-hand side of the buggy. I think the buggy went right over with all four wheels right off the bridge; it cramped before it went over; it went up on this railing and cramped on there. I know it struck the brace. I didn't jump because there was no room to jump. The horse went off the bridge; I couldn't explain how the horse managed to avoid falling on
38 me. I think the horse went off about half way between the bridge and the end of the brace. I didn't notice how he alighted. I was in under the buggy when the horse got on his feet; he pulled the buggy off me; I don't know what part of the buggy was on me. I couldn't tell whether the horse was attached to the buggy when I first got up. I was looking ahead as we came along the road, and if I had seen anything that was an obstruction on the bridge I would have told her to stop; I didn't see anything that would prevent us getting across. The first thing I knew the horse got up to it and began to shy, and my sister began to whip the horse. He didn't start to go around the plank; I don't know whether there was plenty of room to go around or not. We had just started from home, and went up one block or two blocks and let a little brother out of the buggy. We had not crossed the bridge either that day or recently.

MIRANDA FULLER, for the plaintiffs:

I am a sister of Mrs. Thomas, and was with her in the buggy at the time of the accident. We were going for a drive, and we were going across the bridge, and just as we got pretty nigh across it the horse began to shy, and my sister tried to urge him across, but he wouldn't go, and she then whipped him, and he began to rear and back off. Don't know where the buggy ran off, and didn't
39 see the tracks or anything that indicated it. The horse appeared to shy at the plank on the bridge.

Cross-examination:

I didn't get excited at all, neither did my sister that was driving, nor my other sister; we were all cool and collected about it. I didn't think that the horse was going to back clear across and along to the end of the bridge. I was looking ahead and saw everything on the road. I didn't tell my sister there was anything there for the horse to shy at; didn't think that the horse would shy at such a little thing as that. (To counsel for plaintiff:) I am thirteen years old.

Mrs. FULLER, for the plaintiffs:

I am the mother of Mrs. Thomas, the plaintiff. My daughter was pregnant at the time of the accident. Her health was good prior to the accident. She was not with me much of the time before the accident, not more than to drive over. But afterwards she never saw a well day, from the time of the accident until she was delivered of her child. Of course, some days she was a little better,

then some days she was worse. She was with me quite a little while during the six weeks. After the accident they brought her right there to my house, and when she got home she had a sinking spell,
and she was awful sick all night long. Next day she was
40 some better, and she was like that up till the time. After
the second day of August, when she got over it again, she was more like herself, and much better. I don't know but what her health was fully restored. I was with her when the second trouble took place; I didn't notice the date. She complained just one day before that; she was to her own home then. They sent for me.

Dr. WARNER, for the plaintiffs:

I am and have been a practicing physician for twelve years, practising at Boston, Mass., Ipswich, Dakota, and Spanish Fork, Utah. I studied and graduated at the Western Reserve College, Cleveland, Ohio, and then took a post-graduate course in New York city. I am a regular graduate, have a diploma, and have been practicing ever since. I have known Mrs. Thomas about a year, but personally only about six months. I was called in to attend her the latter part of October; she was in bed; she was suffering from what I supposed to be a miscarriage in the early weeks. I could judge only from the symptoms; I considered it a miscarriage in the fourth, fifth or sixth week, somewhere along there. She was suffering pain, and had been for a day or two. She complained of labor-like pains, cramps in the abdomen, flowing quite profusely.
The circumstances of her fall and previous miscarriage might
41 account for her condition and miscarriage on the 31st of Octo-
ber. The fall might account for her condition, her pain and suffering until the date of her first miscarriage.

Cross-examination:

I made no examination until within a week or two, to see what was the cause of her ill health. I found her suffering from falling of the womb. That might be sufficient under some circumstances to cause a miscarriage on the 31st of October. There was a slight congestion. I should hardly consider that a sufficient explanation of the miscarriage on the 31st of October, although it might occur from such a cause. Sometimes very slight causes will produce a miscarriage. The conditions which I found existing could not produce the premature delivery of the dead child on August 2d last; that might have been caused from such a fall; I don't know that that was what caused it. I was living at Spanish Fork at the time; was not called on August 2, and made three or four visits after the 31st of October, and again didn't treat or attend her until a couple of weeks ago.

Redirect examination:

The *prolapsus uteri* must have been caused by some injury, strain, lifting, or something like that; I think it might have been occa-

sioned by such a fall. She will be likely to miscarry in the
42 future if she is not careful. Every one predisposes another.
(To the court:) The womb seems to form a habit.

The COURT: It seems to be a very appropriate term.

Mrs. LAVINA THOMAS, for further cross-examination:

I know Mayor Deal, of Springville, very well. I went and found the mayor a short time after the accident, and he came down to the bridge with me, about half an hour after the thing occurred. I explained to him how the thing occurred, showed him the plank on the bridge; he saw where the buggy was in the creek. I didn't show him exactly where it went off, but described it to him in a general way. I didn't show him the place where I jumped out; didn't tell him that I had jumped out as the buggy went off, or that in substance. I went to the horse's head from where I fell on the edge, right down in the water. I explained to him that I fell in the creek; didn't tell him that I fell on the bank towards the road, and that afterwards I went down the bank and got hold of the horse, or that in substance, or anything like that. (To counsel for plaintiff:) I fell to the east side of the horse, and the girls at the foot of the wall.

Plaintiff rests.

43 EDWIN LEE, for the defense:

On the 16th of June I was acting as deputy road-supervisor, and am acquainted with the bridge in controversy; it is half a block from Main street; it is what we call Center street, running east. My attention was called to the bridge about three or four days previous to the accident. I was going by Packard's store when a man by the name of Hayward called my attention to it. I went right up to see it and saw there was a hole there; two pieces 2 x 4 was broken down into. In the first place the bridge was covered with 2 x 4 edgewise. I went up to Reynolds' store, and got a ten-inch plank, and some spikes. The plank was ten inches wide, about two inches thick, and five feet long. I went to work and spiked that plank down, and cut the ends down and cut the edges off, and fixed it so that nothing could stumble over it on the bridge until we could cover it anew. The hole was somewhere around here (indicating on diagram.) The hole was four inches wide, and about two feet long; I measured it. It was on the north side of the middle. I covered the hole entirely up, and fastened the plank down with spikes—big, large spikes. We were just hunting material to cover the bridge with, we was undecided whether we should use 2 x 4 or 4 x 6, and finally decided to use 2 x 4, but couldn't find only a little over half enough in town,
and we finished it with 4 x 6. My attention was not called
44 direct to the accident, only as I heard it on the street. I was on the ground about twenty minutes afterwards; everybody was gone; the buggy went over one step off the corner of this railing and over the rock. I stepped it—just one step. I found marks of the buggy wheels on the ground, just one step from the railing at the southeast corner of the bridge. The buggy went off the wall,

just about there (indicating); the nigh wheel went off there. I step about three feet. The buggy lay just south of the bridge, upstream. The bottom of the creek was gravel. There were two irrigation heads of water in the creek; the water was probably ankle deep. You could not see the water through the side of the hole. There was about near ten feet of space between the end of the plank and the south railing of the bridge, probably about enough to have driven a team. The retaining wall extends, I should think, about thirty or forty feet up the creek. At the upper end it is level with the ground.

The COURT: What has that retaining wall on the upper side to do with this case?

This wall comes right around the creek; I suppose a team could drive down into the creek.

Cross-examination:

I don't know whether you could drive a horse off where this buggy went off. I am not much used to driving. About the time of the accident we were getting ready to make a new covering. We
45 had contemplated doing that before the accident occurred. We got the board at H. T. Reynolds & Co. The bridge was not in an unsafe condition for travel. We were going to repair it generally, because some of the timbers were getting out of repair. Horses had stepped into the bridge, and I saw the bridge needed a new cover. We were getting ready with our materials for general repairs because of the general condition of the bridge.

R. A. DEAL, for the defendant:

I am now and at the time of the accident was mayor of Springville. My attention was called to the bridge and accident; I couldn't tell the exact date, some time in June, though. I was busy in the store, and Mrs. Thomas came up to the store, and she told me her horse got frightened crossing the bridge on Center street, and had backed off and broke the buggy pretty bad. She wanted me to go up and look at it. She said she expected pay for the buggy; she wanted the damage appraised before they took the buggy away. I told her I had no authority in the matter at all; she would have to make a complaint. She insisted on my going up, and I got into the delivery wagon and she got in with me. We went up to the bridge, and there the buggy laid off the embankment, pretty badly broken up. She showed me how the buggy backed off, and when she saw it was going she jumped off
46 on the side of the bank; she showed me right where she jumped; the other two went down with the buggy, and the horse with his head upstream. She asked me if I wouldn't write a complaint to the city, submitting how much damage, about $150.00 she thought the buggy was worth. I told her I couldn't very well do that, and she had better go to Mr. Boyer or some attorney, or somebody used to that business, and I drove her down to Mr. Boyer's, and she got out. It was just before twelve o'clock. She

told me the accident had happened twenty-five or thirty minutes before. I saw the marks of the buggy there. The wall is located somewhere here (indicating), a little farther to one side. A horse had broken two of the planks here. The horse backed to here, the near hind wheel went off there, and the buggy was held cramped, and the other two went off here, and the horse's head upstream there. She seemed determined to have pay for it, so I went to the store and got a tapeline and measured the whole thing. It's just exactly thirty feet from there to the end of the bridge, and thirty-three feet from there to where the first wheel went off. That was the near hind wheel. From the end of the bridge to where the wheel went of- was between two and three feet. These stringers came within about a foot and a half of the edge, then the cover is on top, it makes about two feet from here to the retaining wall. It is a self-supporting bridge, and braces on each side, and they are bolted through so that it
47 won't spring in the center. If the buggy went off the retaining wall, it would go in the creek just the same as if it went off the bridge. I thoroughly examined the -ridge after the accident. The bridge was in good condition; there wasn't a hole in it. There was a couple of pieces broken through, and this 2 x 8 was nailed over it. I- was about four or five feet long, and 2 x 8 or 2 x 10 wide, and about two inches thick. It entirely covered the hole. I sat down and took out my pocket-knife, and there wasn't a place you could put a common pearl-handled knife in. The bridge was made with 2 x 4's I think, and of course had been worn seven or eight years, and was getting worn. This plank that had been broken through had been a plank with knots in, and some horse had stepped on them and broke them through. I think the present wall has been there about eight or ten years. There is a great deal of travel over that bridge. People in the summer time haul their hay from the fields over that bridge. I should think hundreds of teams would pass there in a day. I never heard of any other accident occurring there, or of any horse getting frightened. I drove across that bridge quite often; drove across it twice that day afterwards with a horse. I am in the habit of driving horses considerably, and do not consider that there is anything in the condition of that bridge to scare a horse. My horse did not show any symptoms of fright. There was nothing conspicuous about that board
48 nailed over this hole; of course it was so that anybody could see it. It was pretty well champered down from the running of the teams, besides what he had hewed, and he had hewed it around the edges.

Cross-examination:

I drove Mrs. Thomas down there with Deal Bros. & Mendenhall's horse; he didn't shy in going down to the bridge. From the foot of that brace to the end of the bridge, at the time of the accident, was a little over two feet; it is probably three feet now, because they have put 2 x 6 on. There is no railing on the embankment for a

distance of thirty or forty feet. It is pretty hard for a vehicle to drop off there; it would drop off if they backed off, but it is a good 8 x 8 brace. Several hundred teams cross there daily in the summer season. The road does not extend along the embankment at all; the embankment runs out here, about forty-five degrees, up the stream. That is all a public street, clear out to there (indicating), but right here comes a race, and there is a bridge across that race there, and it is impossible to get across there. There is no railing on that race bridge. In my opinion that is safe. Wherever there is an embankment over which a vehicle might drop, it needs a railing to make it safe. There is no railing there where that buggy fell off; how would you put railing there on the rocks?

(Exception.) The bridge was safe as the railing stands. It
49 was safe without a railing; it would have been safer with a railing. The embankment goes off in that direction, on the south side. It is not all open and used by the public for travel; it would be impossible to travel it, there is a rugged stream running all through there. (To the court:) There is nothing there to prevent a team from backing off—where this buggy went off. It would be pretty hard to drive them off going front. They could go off. From the south side of the bridge to the south line of the street, I should think must be about fifty feet. Mrs. Thomas told me she jumped off right there (indicating) just on the edge of the rocks.

She would light on the edge of the rocks right here. She told me that she went right down around here and jumped off these rocks and caught the horse by the head. She got out practically on the road and walked around; and never fell out at all.

EUGENIA MONGER, for the defendants:

I reside at Springville, am a teacher at the Hungerford Academy, and have been for twelve years. I was going toward the bridge in the street when the accident happened. I had to cross into the road from John Dallin's corner; that corner is north and east, perhaps five or six rods; and as I went from the sidewalk into the road,

I noticed a buggy passing with three young ladies in it. They
50 seemed to be happy, for I remember hearing them laughing and joking, and the next that I noticed was that the horse began to back—the horse was on the bridge, and the buggy was fully on the bridge, I think, and I saw that the lady had no control of the horse. I saw the horse back off from the bridge onto the ground, and the next, I saw them all go down the embankment right down into the creek. Of course, I ran, and when I reached the bank, the two younger ones were still in the buggy; the top had fallen on them I thought. The other one was out; I can't say where she was, but I remember distinctly that the two younger girls were in it. There were others on the bank who asked them if they were hurt, and they said not, and immediately scrambled out of the water. I don't remember exactly where Mrs. Thomas was at this time, standing in the water I think. When the horse began to back, I should say he was in the middle of the bridge, with his head rather beyond the middle. The first thing I observed wrong with the horse and

buggy was when it began to back and curve the buggy. I don't know that I saw the occupants of the buggy do anything except hold the lines, as I thought, tight; I might be mistaken in that, but I thought that they held the lines very tight. The buggy went over into the creek about here (indicating); the nearest wheel was here.

51 I did not see Mrs. Thomas jump out of the buggy, that I can remember. I saw her down in the creek. As I remember, the buggy went off the bridge so much that I thought they were going to drive down north. When they went over the bank the horse's head was pointed towards the north.

Q. You stated you thought they were going to drive north, and I ask you why you thought so.

The COURT: I don't think that is competent testimony at all. Exception by defense.

I wouldn't dare say that the buggy and horse were entirely off the bridge before they fell off the bank. That is my impression, but I may be mistaken; I wasn't near enough; I was in the middle of the street. I was some four rods away. When the buggy went over I could see the three young ladies plainly. I think that they all went over together; I can't be positive, however.

ALEXANDER ROBERTSON for the defendants:

I reside at Springville, have resided there for about thirty years, and was there on the day of the accident. There was a hole in the bridge previous to the accident, and the day of the accident it had been fixed. The plank covered the entire aperture. There was no hole, I noted particularly. The hole in the bridge was where the wheels would naturally run—that I couldn't tell exactly—but

52 where the north wheel of the buggy would naturally run; that is where it was wore. There was no obstruction at all on the bridge, except where the piece was put there.

Cross-examination:

I am a member of the city council now. Was not mayor last term; Deal was mayor. Have been a member of the city council for some years.

JOSEPH STEVENSON, for the defendants:

I reside at Springville. I examined the bridge both before and after the accident. I crossed there in the morning before the accident occurred, on foot, going to my work about seven o'clock, somewhere in the neighborhood of seven o'clock, and I noticed particularly the plank being put on there. I know that it covered the hole. I observed it after the accident, in the evening, and couldn't see any difference in the condition of it. It was impossible for a person or a horse standing over it to look through it and see the water under the bridge. They might possibly have seen it between the 2 x 4's some other place, where it was in good condition, except in dry weather, you know, they might see it through there by looking very closely.

JAMES E. HALL, for the defendants:

I have resided in Springville forty years and know the
53 bridge in question, and have ridden over it many a time. I passed over it both before and after the accident, on that day. I passed it a few days before that, and remember the occasion of the repairs being made, some three or four days before the accident. The board over the hole entirely covered it. There was no aperture left between the edges of the hole and the edges of the board. (Indicating diagram made by Mr. Sutherland). The brace should extend from here to the end of the stringer here. The covering of the bridge covers the end of the brace, but the brace comes clear to the head of the stringer; and the same on the other end. There is a space of somewhere between two and a half and three feet where there is no protection, a child could get through. There are places where it is not boarded up tight. I never knew of any other accident happening there, or of anybody driving off the bridge. They drive up here—along the creek—drive up along here. I have known teams to drive up here and get rock out of the bed of the stream, and sand. That bird's-eye view (indicating) is a correct representation. (Indicating sectional view.) This brace here should rest on the wall here. It should rest on the foot of the wall here. It is an approximate representation of it.

Mr. CRITCHLOW: I offer this in evidence.
No objection.
(Marked "Def't's No. 1.—J. W. P.")

54 Cross-examination:

There is two or three feet unguarded on the level with the floor of the bridge. No, there is not a few feet after you get out there, that the highway abuts upon, the travelled way, before the retaining wall swings off, it swings off right from this point. This begins to widen, the approach on the bridge this way, and then the wall slopes down this way up the creek. In case of a sudden shying or swerving from any cause from the highway there, there is nothing for a distance of four or five feet, including a part of the bridge and two or three feet here, that would prevent a vehicle from going over that wall.

Redirect examination:

The rock-work that extends up the creek from the bridge is about twenty feet long. I am familiar with the general condition of the bridges in the county of Utah.

Q. I will ask you how the bridge in question here compares with the ordinary average bridges through this section of the country.

Objected to.

The COURT: That objection is sustained; to compare one bad bridge with another does not make either of them good.

Mr. CRITCHLOW: I take an exception to the remark of the court.

55 The COURT: Very well, you can take an exception to that and an exception to the ruling as well.

Mrs. THOMAS, for cross-examination:

I saw Mrs. Ella Deal at the place of the accident after everything was all moved away. Mrs. Deal did not ask me how it was that I was not wet, and I didn't reply, "Because I didn't go into the water," or words to that effect. I had no conversation with her at all. The remark she made—she came to me and said, "Did you try to kill yourself?" or something to that effect, as I was riding in the buggy with her husband. That is all she said to me.

Mr. THURMAN: Were you wet, as a fact from that accident?

Objected to. Objection overruled; defense excepts.

A. I was wet.

Mrs. ELLA DEAL, for the defendants:

I have resided at Springville all my life—34 years. I know the bridge; was there about half an hour from the time we first heard of it. We were in meeting and the word came that the Fuller girls were out riding and fell over the bridge. Our meeting was

56 nearly closed, and at the close me and a great many other ladies went down to the bridge. When we got there, neither of the girls were there, but the buggy laid in the water, and we started to go home, and I saw her and Mr. Deal coming in the delivery wagon. They were just turning the meeting-house corner. I asked Mrs. Thomas how she could fall off that bridge and not be hurt or wet. She says, "I didn't fall off, my two young sisters went into the water, and I jumped out." She didn't complain of being hurt at the time; she sat in the wagon with Mr. Deal; she said nothing at all about being hurt. (To Mr. Thurman:) I am the wife of the witness on the stand yesterday, Mayor Deal. I was first notified last evening that I would be wanted here.

Mrs. MARY MENDENHALL, for defense:

I live at Springville, and was there just after the accident, with Mrs. Deal at the bridge. Mr. Deal and Mrs. Thomas came up while we was on the bridge. Just as we were getting ready to go away they drove up, and we stopped until they got there, and then Mrs. Deal went up to the buggy and asked her this question, and she said she didn't go off in; she jumped out, but her other two sisters did, and one of them was hurt, she said, but she didn't know how badly. Mrs. Thomas didn't complain of being hurt.

57 Cross-examination:

Mrs. Deal just asked her how it was that she wasn't wet or hurt after going over the bridge, and she said she didn't go over. That conversation took place right on the bridge with Mr. Deal in the delivery wagon with her. I never heard of being wanted until

last evening, to testify. I have talked to Mayor Deal about this case.

Mrs. THOMAS in rebuttal:
No such conversation as the two last witnesses stated occurred.
Q. Just state what did occur.

Objected to. Objection overruled. Defense excepts.

Mrs. Deal and Mrs. Mendenhall came along, and they was between the meeting-house and the bridge, and Mr. Deal stopped the delivery wagon and stopped to talk, and Mrs. Deal says, "What have you been trying to do—trying to kill yourself?" She says, "How was it you didn't get hurt?" I never said nothing. I spoke to her. Mrs. Mendenhall says, "Well, I thought sure you girls were all killed." I didn't know I was hurt at that time. There was nothing said about being wet.

Q. Do you remember anything about his horse getting frightened there?

Objected to by counsel for defendant.

58 Mr. THURMAN: I asked Mr. Deal if such a thing took place and he said no.

Mr. CRITCHLOW: Then you are bound by his answer on an immaterial point.

The COURT: It is within the discretion of the court to allow it, and I will allow the question to be asked.

Exception by defense.

His horse shied, and tried to get around it, and I asked him to let me out of the buggy. He says, "No, that will be all right; I will get him across."

Cross-examination:

This occurred crossing the bridge; we was going towards the east from the west. The horse was at the edge of the bridge, he could see the board that my horse got frightened at before he got on the bridge. He got frightened at the same object that my horse did, and I wanted to get out of the wagon.

Mrs. FULLER, in rebuttal:
I saw my daughter Lavina when she came home after the accident.

Q. State the condition of her clothing as being wet or otherwise.

Objected to as not rebuttal. Objection overruled. Defense objects.

59 When she came home she was wet to her knees. Her shoes and stockings was wet entirely through and the bottom of her dress, and her dress was badly torn. She didn't tell me how she got wet. I was right there.

R. A. DEAL, recalled for the defense:
I heard the testimony of Mrs. Thomas with regard to the shying

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59 and stockings was wet entirely through and the bottom of her dress, and her dress was badly torn. She didn't tell me how she got wet. I was right there.

R. A. DEAL, recalled for the defense:
I heard the testimony of Mrs. Thomas with regard to the shying

of my horse. My horse did not shy there on the bridge; it never shied; I drive him right across it. He didn't balk or turn at this place. Mrs. Thomas did not at the time ask to get out of the buggy, nothing of the kind happened there.

The foregoing was all the testimony offered upon the trial. At the close of the testimony counsel for defendant requested the court to instruct the jury as follows, to wit:

1. The court instructs the jury to return a verdict in these causes for the defendant, and to the refusal of the court to give said instruction, counsel for defendant excepted.

2. The court instructs you that the defendant was not bound to open its street in good condition for its whole width. If the street was open to such a width and kept in such a condition as to be reasonably safe for travellers using ordinary care, and for horses and other animals reasonably well broken and capable of being
60 controlled, then the defendant performed its whole duty in this respect, and is not liable for an accident arising from the fright or balkiness of an animal on such street; to give which instruction the court refused, and to such refusal, counsel for defendant duly excepted.

3. If the jury find that the repair to the hole in defendant's bridge was repaired in the reasonable and ordinary manner, and in such a manner as to cause no obstruction to the reasonable and ordinary use thereof, and that in spite of this, the animal of plaintiff, without sufficient cause or excuse shyed at the board used in making such repair, and in consequence thereof, backed off the bridge or backed off the bank at the end of the bridge, then the accident was not one for which the defendant is liable, and your verdict should be for the defendant; to give which instruction the court refused, and to such refusal counsel for defendant duly excepted.

4. The defendant was not bound to keep its bridge in such condition that damage might not be caused thereon by a horse which was not controllable by its driver, unless the fright which caused it to escape from the driver's control was occasioned by some negligent act of the defendant, to give which instruction the court refused, to which refusal counsel for defendant duly excepted.

61 5. In this case the court charges you that unless the repair, which, as claimed by plaintiff, caused the horse to shy and back along the bridge, was negligently made, the accident was not one for which the defendant is liable, and your verdict should be for the defendant; to give which instructions the court refused, to which refusal counsel for defendant duly excepted.

6. The court instructs you that the defendant is not an insurer of the safety of travellers upon its streets. It is sufficient if the street or bridge is in a reasonably safe condition for travel in the ordinary modes. Whether or not it was so reasonably safe is to be determined by you as reasonable men, to give which instruction the court refused, to which refusal the counsel for defendant duly excepted.

The court then charged the jury as follows, to wit:

GENTLEMEN OF THE JURY: You are the sole judges of the testimony, its force and effect, its meaning and the truthfulness of what the witnesses have stated. The court has no right to dictate to you in any way as to what you shall find to be the testimony in the case. In determining these questions you will use your best judgment as men, your experience in life, your knowledge of the motives that influence men's conduct and influence their state-
62 ments, taking into consideration the opportunities that the witnesses have to know the facts that they speak about; you may also consider the bearing of the witnesses on the stand, and the interest, if any they have, in the controversy. Take all these things into account, and make up your minds as to where the truth is, if there is a dispute about the facts.

There are two cases here before you. One is the case of Thomas himself, claiming damages for injury to his horse and buggy. You will find separate verdicts in each case. The liability of the city depends upon the same class of facts in both cases, so that they are very well and properly tried together. Now a city is liable if it does not exercise reasonable care in making its roadways, bridges and sidewalks, and all that kind of thing, good. That is, it is liable for any negligence in that regard. Negligence, ordinary negligence, is want of reasonable care. So that, if you find from a preponderance of the evidence, the burden of proof being on the plaintiff to show that fact—if you find from a preponderance of the evidence that the city was negligent in the manner of constructing and keeping in repair this bridge, and that in addition to that, that the negligent condition of the bridge caused the injury complained of, then it is your duty to find for the plaintiff. You understand me? Not only must you find from a preponderance of the evidence that the city was negligent in the manner of keeping this bridge in re-
63 pair, constructing it and keeping it in repair, but you must also find that that negligence caused the injury, in order to find for the plaintiff. If you find that, then in both cases you will find for the plaintiffs.

In the case of Mr. Thomas alone, where he sues for the value of the horse and buggy, if you find that the city is liable—has been negligent so as to cause this injury—then you will find for Mr. Thomas for the value of the injury done to the horse and destruction of the buggy, or part destruction, or whatever it was.

If you find that injuries were caused by the negligence of the city to Mrs. Thomas, then the damages that she has suffered are questions for you. They are not speculative or anything of that kind. You will determine from your best judgment as to what damage she has suffered; and in doing that you will take into account her sufferings and injuries, if any, or whatever they are; you will take into the account, her mental distress, if any, caused by the injuries. If her health was permanently injured in any way, you will take that into the account, and give her such damages as she is reasonably entitled to.

I think I have not omitted to instruct on any point that I have been asked to instruct upon.

All that the defendant is bound to do, in reference to that bridge and the street there, is to make the bridge reasonably safe and
64 the approaches to it reasonably safe for the passage of pedestrians and vehicles—wide enough for the necessities of travel. That is all that the city is bound to do. They are *not* bound to have a highway there wide enough for all the vehicles that might be passing in Broadway, New York; but they have only got to keep that street in repair, and that bridge in repair and shape, so that the ordinary travel will be safe and reasonably provided for in passing.

I am asked to instruct the jury that if they find that the repair was reasonably made—the covering of that hole—the city would not then be liable. That is not true, stated in the abstract that way. But you are to take into the account in determining that question, the whole condition of the bridge. If the bridge was left in such shape ordinarily that a horse might get frightened or unmanageable, or anything of that kind, and very easily back off the bridge and throw the parties into the creek, it is your duty to determine whether that would be negligence or not. The mere repair of that bridge, covering that hole, would not excuse the city if the bridge otherwise was unreasonably out of repair.

End of charge.

Thereafter, on the 15th day of February, 1893, the jury returned into court and presented a verdict in the cause entitled Perry
65 A. Thomas and Lavina Thomas *vs.* this defendant, finding damages in favor of said plaintiffs and against this defendant in the sum of $2,300.00, which verdict was concurred in by ten only of said jurors, and dissented from by the remaining two jurors. That at the time the same was presented into court, this defendant, by its counsel, objected to receiving the same, for the reason that the same was not a proper verdict, in that it was not the unanimous verdict of the jury; but the court overruled said objection and received said verdict, and caused the same to be entered in this cause.

And in like manner, at the same time the said jury presented a verdict in the cause of Perry A. Thomas against this defendant, in which verdict eleven only of said jurors concurred, and the other juror dissented, in which damages were found in favor of plaintiff and against defendant in the sum of $120.00. Counsel for the defendant then and there objected to the receiving of said verdict, for the reason that the same was not the unanimous verdict of the jury; but the court overruled said objection and received said verdict, and caused the same to be entered as and for the verdict of the jury in said cause.

The defendant assigns the following as the errors of law
66 occurring during the trial duly excepted to at the time, as those upon which it will rely upon motion for new trial and upon appeal:

1. The court erred in permitting the witness Whitehead to answer — or not he knew of any horse being frightened at the bridge.

2. The court erred in denying the motion of defendant to strike out all the testimony of the witness Whitehead as to the actions and disposition of his own horse.

3. The court erred in refusing to allow counsel for defendant to ask witness Whitehead as to the thickness of dust upon the bridge.

4. The court erred in permitting counsel for plaintiffs to ask the witness Storrs whether he had seen any horses shying on the bridge, and in overruling the objection of defendant to said question and answer.

5. The court erred in overruling the objection of defendant to the question asked the witness Storrs as to how many horses he saw shy on the bridge after the board had been put on.

6. The court erred in denying the motion of defendant to strike out the testimony of witness Storrs that he supposed the hole in the bridge dangerous, after the accident.

67 7. The court erred in permitting the counsel for plaintiffs, against the objection of defendant, to ask the witness Storrs whether he called the attention of the city authorities to the bridge after the accident.

8. The court erred in permitting counsel for plaintiff- to interrogate witness Storrs as to his conversation with Lee.

9. The court erred in overruling the objection of defendant to the question asked the witness Storrs as to whether he had called the attention of the city supervisor to the bridge.

10. The court erred in permitting the counsel for the plaintiffs to ask the witness Storrs whether he remembered stating to counsel for plaintiffs that he had called the attention of his son to the condition of the bridge after the plank was put on.

11. The court erred in overruling the objection of counsel for defendant to the question asked the witness Storrs as to whether the plank was, to any extent, an obstruction to travel.

12. The court erred in refusing to allow the witness Monger to state why she thought the plaintiff was going to drive north after backing off the bridge.

68 13. The court erred in permitting the counsel for the plaintiffs to ask the plaintiff whether she was wet as a fact from the accident.

14. The court erred in permitting the witness Fuller to answer against the objection of defendant, as to the condition of the clothing of plaintiff when she came home, after the accident.

15. The court erred in permitting the plaintiff, Mrs. Thomas, to testify, in rebuttal, as to the horse of the witness Deal becoming frightened at the bridge.

16. The court erred in refusing to instruct the jury as requested in instruction No. 1.

17. The court erred in refusing to instruct the jury as requested by defendant in instruction No. 2.

18. The court erred in refusing to instruct the jury as requested by defendant in instruction No. 3.

19. The court erred in refusing to instruct the jury as requested by defendant in instruction No. 4.

20. The court erred in refusing to instruct the jury as requested by defendant in instruction No. 5.

69 21. The court erred in refusing to instruct the jury as requested by defendant in instruction No. 6.

22. The court erred in instructing the jury that a city is liable if it does not exercise reasonable care in making its roadways, bridges and sidewalks, and all that kind of thing, good.

23. The court erred in instructing the jury as follows: "So that, if you find from a preponderance of the evidence, the burden of the proof being on the plaintiff- to show that fact—if you find from a preponderance of the evidence that the city was negligent in the manner of constructing and keeping in repair this bridge, and that in addition to that, that the negligent condition of the bridge caused the injury complained of, then it is your duty to find for the plaintiff."

24. The court erred in instructing the jury as follows: "In the case of Mr. Thomas alone, where he sues for the value of the horse and buggy, if you find that the city is liable—has been negligent so as to cause this injury—then you will find for Mr. Thomas for the value of the injury done to the horse and destruction of the buggy, or part destruction, or whatever it was."

25. The court erred in overruling objection of defendant to and in receiving and causing to be filed and entered the verdict

70 of the jury in the case of Perry A. Thomas and Lavina Thomas *vs.* Springville City.

26. The court erred in receiving and causing to be filed and entered, against the objection of defendant, the verdict in the case of Perry A. Thomas *vs.* Springville City.

Specification of Particulars

in which the evidence is insufficient to justify the verdict of the jury:

I.

The evidence is insufficient to justify the verdict in this: That it does not appear that the bridge was unsafe for ordinary travel under ordinary circumstances, with horses ordinarily and reasonably safe.

II.

It does not appear that the accident was due to the unsafe character of the bridge, or any approach thereto, but was due wholly to the unexpected fright and shying and backing of the horse of plaintiffs; which fright was not due to anything unsafe or out of repair in the bridge.

III.

71 It does not appear that the manner of construction of the bridge or the want of supports or railings upon the same in any manner contributed to the accident in the causes, but, on the contrary, it does appear from the evidence, that the buggy was

backed by the horse off the end of the bridge around the retaining wall, and so into the creek.

IV.

It does not appear the accident was caused solely or at all by the lack of railing upon the approach or around the retaining wall, or by any lack of repair in the floor of said bridge, or that plaintiff was without fault upon her part. But it does appear that the plaintiff was in fault in driving a horse subject to fright at so trivial a cause, as that shown by the testimony in these causes.

V.

The evidence is insufficient to show that the street and roadway leading to said bridge, and the bridge itself, were not ordinarily and reasonably safe for all ordinary purposes of travel.

VI.

The evidence does not show that plaintiffs were damaged, or that the plaintiff, Lavina Thomas, was damaged in the sum of twenty-three hundred dollars, or any part thereof, in excess of five hundred dollars, if at all.

D. C. JOHNSON,
RAWLINS & CRITCHLOW,
Attorneys for Defendant.

72 We, the attorneys in the cause above entitled, hereby stipulate that the foregoing is a full and correct statement of the testimony and proceedings herein, and that the same may be settled by the court as and for defendant's statement upon motion for new trial and upon appeal.

THURMAN & SUTHERLAND,
Attorneys for Plaintiff.
D. C. JOHNSON,
RAWLINS & CRITCHLOW,
Attorneys for Defendant.

Upon the foregoing stipulation, the foregoing is hereby settled as and for defendant's statement upon motion for new trial and upon appeal herein.

JOHN W. BLACKBURN, *Judge.*

Dated May 10, 1893.

Title of Court and Cause.

It is hereby stipulated that a good and sufficient undertaking upon appeal in this cause to the supreme court of Utah Territory has been duly filed herein.

THURMAN & SUTHERLAND,
Attorneys for Plaintiff.

Dated July 20, 1893.

73 Title of Court and Cause.

Notice of Intention to Move for a New Trial.

To the clerk of said court and to Messrs. Thurman and Sutherland, attorneys for plaintiff-:

You will please take notice that the defendant herein intends to move this court to set aside the verdict of the jury herein and the judgment entered thereon and to grant a new trial of this cause for the following reasons, to wit:

1. Irregularity in the proceedings of the court and abuse of discretion, by which the defendant was prevented from having a fair trial.

2. Misconduct of the jurors, in that one or more of the jurors were induced to assent to the verdict by a resort to the determination of chance, and that the verdict returned into court was not the verdict of all the jurors, but of a number less than all.

3. Newly discovered evidence, material for the defendant, which it could not with reasonable diligence have discovered and produced at the trial.

4. Excessive damages appearing to have been given under the influence of passion or prejudice.

74 5. Insufficiency of the evidence to justify the verdict, and that the same is against law.

6. Errors in law occurring at the trial and excepted to by the defendant.

Said motion will be made on a statement of the case and upon affidavits to be prepared and served.

Dated February 24, 1893.

RAWLINS & CRITCHLOW,
Attorneys for Defendant.

Title of Court and Cause.

Notice of Appeal.

To the plaintiff- and Thurman & Sutherland, *his* attorneys:

Take notice that the defendant in the above-entitled action hereby appeals to the supreme court of said Territory from the judgment therein rendered and entered in said district court on the 15th day of February, 1893, in favor of the said plaintiff- and against the said defendant and from the whole thereof; also from the judgment and order therein made and entered in said district court on the

75 10th day of May, 1893, in favor of the plaintiff- and against said defendant in overruling and denying said defendant's motion for a new trial in said action.

Dated July 5, 1893.

RAWLINS & CRITCHLOW,
Attorneys for Defendant.

Title of Court and Cause.

It is hereby stipulated that the foregoing may be filed this day as the transcript upon appeal in this cause, and we hereby acknowledge service of copy of the same.

GEO. SUTHERLAND,
Attorneys for Respondent.

Dated Oct. 6th, 1893.

76 In the Supreme Court of Utah Territory, Regular January Term, 1894.

TUESDAY, *January 16th.*

PERRY A. THOMAS & LAVINA M. THOMAS
vs.
SPRINGVILLE CITY, Appellant.

This cause, coming on regularly for hearing, was argued by E. B. Critchlow, Esq., in behalf of appellant, and by George Sutherland, Esq., in reply, was submitted, and taken under advisement.

(Title of Court and Cause.)

MONDAY, *January 29th*, 1894.

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed with costs.

(Title — Court and Cause.)

TUESDAY, *M'ch 20th*, 1894.

The petition for a rehearing of this cause, heretofore filed, is denied.

77 In the Supreme Court of Utah Territory.

PERRY A. THOMAS and LAVINA M. THOMAS, Respondents,
vs.
SPRINGVILLE CITY, Appellant.

MINER, *J.:*

This action is brought to recover damages claimed to have been sustained by Lavinia M. Thomas, and occasioned by a fall from a bridge over a stream within the corporate limits of the defendant. The plaintiff was driving a horse attached to a carriage across this bridge, when the horse became frightened at a hole in the bridge, which had been partly covered by a plank, and backed off the bridge, causing the plaintiff to fall about 10 feet, into the water below. Plaintiff claims damages on account of the unsafe and negligent condition in which the bridge was left. The floor of the bridge had become worn out in places, and had been repaired before the

accident. The hole in the bridge was estimated by several witnesses to be from three to eleven inches wide and two to three feet in length. This hole had been repaired by defendant by placing plank over it in such a manner as to leave a crack on either side, estimated by various witnesses at from one to three inches in width, through which the water could be seen below. That for about four feet at each end of the bridge where the buggy went off the approaches to it were not protected by any railing or guard-rail, to prevent vehicles from going over. The horse driven by plaintiff was gentle, and it appears plaintiff was accustomed to driving horses. The plaintiff drove upon the bridge from the east, when the horse became frightened at the plank or crack in the covering, and, notwithstanding the efforts of the plaintiff by the use of the whip to urge the horse over the plank, the horse backed the carriage and the occupants over the unprotected end of the bridge, precipitating the plaintiff and others into the channel of the stream, about 10 feet below. The testimony shows that plaintiff received some injuries. Within a short time after the accident she was prematurely delivered of a dead child; and that some three or four months thereafter she suffered a miscarriage, all of which, it is claimed, was
78 occasioned by the injury received at the time. It also appears that, had a railing been placed at the approach to the bridge, the accident might have been avoided. The testimony was conflicting. Upon the trial the jury rendered a verdict in favor of the plaintiff for $2,300. Upon the motion for new trial the court struck out the sum of $1,000, leaving a judgment for the plaintiff of $1,300.

The appellant contends that there is no evidence in the record showing negligence on the part of the city. Upon an examination of the record and of the authorities bearing upon this question we are satisfied that there was sufficient evidence before the jury upon the question of negligence by the city in not providing a suitable railing to the approach of the bridge, and upon the question of negligence and want of proper care on the part of the city in failing to make a reasonably proper repair of the defect in the floor of the bridge. These matters were within the special province of the jury to pass upon under the evidence given, and their verdict should not be disturbed. Houfe *v.* town of Fulton, (Wis.) 9 Amer. Rep., 568; Hey *v.* Philadelphia, (Pa.) 22 Amer. Rep., 733; Kennedy *v.* Mayor, etc., 73 N. Y., 365; Ring *v.* City of Cohoes, 77 N. Y., 83; City of Sterling *v.* Thomas, 60 Ill., 264; Black, Proof & Pl., § 85; Leak *v.* Railway Co., (Utah) 33 Pac., 1045.

It is also contended that the court erred in allowing witness Storrs to testify that he had seen two or three horses shy at this broken place in the bridge in question. We think this testimony was properly admitted for the purpose of showing notice to the city, and also as tending to show that this covering and crack in the bridge was an object likely to frighten horses. The authorities seem to be practically uniform on this subject. Darling *v.* Westmoreland, 13 Amer. Rep., 55; Hill *v.* Railroad Co., 92 Amer. Dec., 604; City of Chicago *v.* Powers, 42 Ill., 169; City of Delphi *v.* Lowery, (Ind.) 39

Amer. Rep., 98; City of Augusta *v.* Hafers, (Ga.) 34 Amer. Rep., 95; Pomfrey *v.* Village of Saratoga Springs, 104 N. Y., 459; 11 N. E., 43; District of Columbia *v.* Armes, 107 U. S., 519; 2 Sup. Ct., 840.

Exception is taken to the refusal of the court to give defendant's first and third requests. In the first request the court was asked to direct a verdict for the defendant. This, as we have seen, was properly refused. In the third request the court was asked to charge the jury, in substance, that if the hole in the bridge was repaired in a reasonable and ordinary manner, so as to cause no obstruction to the reasonable and ordinary use of the bridge, and that the horse shied at the board used in its repair, without sufficient cause or excuse, and backed off the bridge, then the defendant would not be liable. The court did not give its charge in the language used, but told the jury, in substance, that in determining that matter they should consider the whole condition of the bridge. That the
79 city was liable if it did not use reasonable care in making its roadways and approaches to, and the bridge itself, reasonably safe. That ordinary negligence was the want of reasonable care. If the city was negligent in the manner of keeping the bridge in repair, and the negligent condition of the bridge caused the injury complained of, then the city was liable. That if it was left in such a condition that a horse would become frightened and unmanageable, and very easily back off the bridge, and cause injury, then it was the duty of the jury to determine whether it was negligence or not. That if the injury occurred in any other manner than as stated by the court, they must find for the defendant, etc. We can see no objection to the third request as offered, except that it was not broad enough to cover other features of the alleged negligence presented by the testimony. The whole charge, taken together, fairly presented the law of the case to the jury.

Many other errors were assigned in the record, but we have examined all that were discussed in the appellant's brief, and not waived at the hearing. Upon the whole record we find no reversible error. The judgment of the district court is affirmed with costs.

We concur.
BARTCH, *J.*
SMITH, *J.*

Endorsed: #417. Title court and cause. Opinion. Filed in the supreme court Jan. 29, 1894, at Salt Lake City, Utah. Jos. P. Bache, clerk, by John C. Shipp, dep. cl'k.

80 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable supreme court of the Territory of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before said court, between Perry A. Thomas and Lovinia Thomas, plaintiffs, and Springville City, defendant, a manifest error hath happened, to

the great damage of the said defendant, as by its complainant appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in that behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within sixty days from the date hereof, in the said Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 31st day of March, in the year of our Lord one thousand eight hundred and ninety-four.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

80½ [Endorsed:] 417. Springville City, plaintiff in error, *vs.* Perry A. Thomas *et al.*, def'ts in error. Writ of error. Filed in the supreme court and copy lodged with me Apr. 10, 1894, at Salt Lake City, Utah. Jos. P. Bache, clerk.

81 UNITED STATES OF AMERICA, *ss:*

To Perry A. Thomas and Lovinia Thomas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Utah, wherein Springville City is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 31st day of March, in the year of our Lord one thousand eight hundred and ninety-four.

DAVID J. BREWER,
Justice of the Supreme Court of the United States.

81½ [Endorsed:] 417. In the supreme court of Utah. Perry A. Thomas *et al. v.* Springville City, appellant. Citation. Filed in the supreme court Apr. 10, 1894, at Salt Lake City, Utah. Jos. P. Bache, clerk. Copy served April 9, '94. Williams, Van Cott & Sutherland & S. R. Thurman, att'ys for def'ts in error.

82 In the Supreme Court of the United States.

PERRY A. THOMAS and LAVINA M. THOMAS, Defendants in Error,
vs.
SPRINGVILLE CITY, Plaintiff in Error.
} Assignments of Error.

Now comes Springville City, the plaintiff in error herein, by its attorney, and shows to the court that manifest error has been committed by the supreme court of Utah Territory in affirming the judgment of the district court of the first judicial district of Utah Territory herein, and assigns the following as the particular errors herein upon which plaintiff in error relies for a reversal of the judgment:

I.

The court erred in affirming the judgment of the first judicial district court herein for the reason that said trial court erred in receiving and causing to be filed and entered, against the objection of plaintiff in error, the pretended verdict of the jury in this cause, the same being concurred in by nine members of the jury only.

II.

The court erred in affirming the judgment of the first judicial district court herein for the reason that said trial court erred in causing judgment to be entered in favor of defendant- in error and against plaintiff in error, based upon the pretended verdict of the jury herein.

83 III.

The court erred in affirming the judgment of the first judicial district court for the reason that said trial court erred in overruling and denying the motion of plaintiff in error for a new trial of this cause.

Wherefore, on account of the errors of the supreme court of Utah Territory above assigned and set forth, plaintiff in error, Springville City, prays that the judgment of said court be reversed, and that this cause be remanded to said court with instructions to set aside the judgment of the first judicial district court of Utah Territory and to return said cause to said trial court for a new trial of the same.

JOSEPH L. RAWLINS,
Attorney for Plaintiff in Error, Springville City.

83½ [Endorsed:] No. 417. In the Supreme Court of United States. Springville City, plaintiff in error, *vs.* Perry A. Thomas and Lavina Thomas, defendants in error. Assignment of errors. Copy of the within served on — this — day of ——, 189–. ——— ———, attorney for —. Filed this 10th day of April, 1894. Joseph P. Bache, clerk, by ——— ———, deputy clerk. Rawlins & Critchlow, attorneys for plaintiff in error.

84 In the Supreme Court of Utah Territory.

PERRY A. THOMAS and LAVINA M. THOMAS, Respondents,
vs.
SPRINGVILLE CITY, Appellant.

Supersedeas Bond.

Know all men by these presents that we, Springville City, a municipal corporation of Utah Territory, and Lyman S. Wood and H. T. Reynolds, of the county and Territory of Utah, are held and firmly bound unto the above-named Perry A. Thomas and Lavina M. Thomas in the sum of two thousand six hundred ($2,600) dollars, to be paid to the said Perry A. Thomas and Lavina M. Thomas; for the payment of which, well and truly to be made, we bind ourselves and each of us and our and each of our successors, heirs, executors, and administrators, jointly and severally firmly, by these presents.

Sealed with our seals and dated the 24th day of March, A. D. 1894.

Whereas the above-named Springville City has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the supreme court of Utah Territory in the above-entitled suit:

Now, therefore, the condition of the obligation is such that if the above-named Springville City shall prosecute said w-it of error to effect and answer all damages and costs if it fail to make its plea good, then this obligation shall be void; otherwise the same
85 shall be and remain in full force and effect.

SPRINGVILLE CITY, [SEAL.]
By JAMES E. HALL, *Mayor.*

[Corporate Seal Springville.]

Attest: WM. M. ROYLANCE, *Recorder.*
LYMAN S. WOOD. [SEAL.]
H. T. REYNOLDS. [SEAL.]

Sealed and acknowledged before me this 24th day of March, A. D. 1894.

D. C. JOHNSON.

TERRITORY OF UTAH, } ss:
County of Utah, }

Lyman S. Wood and H. T. Reynolds, being each first duly sworn, deposes and says: I am a resident freeholder of Utah county and Territory and am worth the amount named in the foregoing bond as the penalty thereof over and above all my just debts and liabilities, exclusive of property exempt from execution.

LYMAN S. WOOD.
H. T. REYNOLDS.

Subscribed and sworn to before me this 24th day of March, 1894.
[SEAL.] DON. C. JOHNSON,
Notary Public.

My commission expires May 4th, 1894.

The above and foregoing bond hereby approved and allowed as a supersedeas bond on writ of error in this cause.

DAVID J. BREWER,
Associate Justice Sup. Ct. of U. S.

Dated Mar. 31, 1894.

(Endorsed:) 417. Title court and cause. Supersedeas bond. Filed April 10th, 1894. Jos. P. Bache, clerk.

86 UNITED STATES OF AMERICA, } ss:
Territory of Utah, County of Salt Lake, }

I, Joseph P. Bache, clerk of the supreme court of said Territory of Utah, in pursuance of the attached writ of error, do return, annexed hereto and to said writ, the original citation, a transcript of the record, the proceedings, opinion, assignment of errors, supersedeas bond, all in and of said court in the cause in said writ described, to the Supreme Court of the United States; and I hereby certify that said annexed transcript of said record, porceedings, opinion, assignment of errors, and bond is a full, true, correct, and complete copy of the several originals thereof on file or of record in my office.

Seal Supreme Court Territory of Utah, United States of America.

In witness whereof I hereunto set my hand and the seal of said supreme court of Utah Territory this 18th day of April, A. D. 1894, at Salt Lake City.

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Endorsed on cover: Case No. 15,584. Utah Territory supreme court. Term No., 103. Springville City, plaintiff in error, *vs.* Perry A. Thomas and Lovinia Thomas. Filed April 30, 1894.

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166-707

Office Supreme Court U. S.
FILED.
DEC 26 1894
JAMES H. McKENNEY,
CLERK.

In The Supreme Court of the United States.

SPRINGVILLE CITY, PLAINTIFF IN ERROR, *vs.* PERRY A. THOMAS AND LAVINA THOMAS, DEFENDANTS IN ERROR.

Brief of Plaintiff in Error on motion to dismiss.

Article VII of the Amendments to the Constitution provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

In a District Court of Utah, created by act of Congress, the defendant in error brought a suit at common law against Springville City for the recovery of damages for personal injury. The case was tried by a jury, nine members of which concurred in finding a verdict for $2,300.00, in which three members refused to concur. Upon this verdict, against the objections of the city, the Court entered judgment.

Whether the Court had authority to do this is the question directly involved in this case. The Supreme Court of the Territory held that it had such authority.

The validity of this authority—thus exercised under the United States—is directly brought in question.

The contention of the defendant in error is that the District Court had this authority under the act of the Territorial Legislature set out in the brief on the other side.

The plaintiff in error contends that such authority is forbidden by the foregoing provision of the Constitution.

This Court has jurisdiction of this case without regard to the amount involved "if there is drawn in question the validity of an authority exercised under the United States," whether the decision of the lower Court was for or against the authority.

Baltimore & Potomac Rd. Co. *v.* Hopkins, 130 U. S., 210.

Clayton *v.* Utah, 132 U. S., 632.

Clough *v.* Curtis, 134 U. S., 361.

The first of these decisions draws the distinction between the question of the validity of a statute or authority, and the question of the construction of the statute or the regularity of the exercise or administration of a conceded authority. In the former case this Court has jurisdiction in the latter cases not.

The cases upon which counsel on the other side relies all belong to the latter class, as does the case of Linford *v.* Ellison, recently decided.

The case at bar clearly belongs to the former class.

We assert, and that is the very question involved—that the District Court had absolutely *no* authority to enter judgment in this suit at common law except upon the verdict concurred in by all the members of a jury of twelve men. It is not a question as to the erroneous exercise of an authority nor of the construction of a statute.

The validity—the very *existence* of the authority—of a tribunal acting under the Constitution and laws of the United States is involved and questioned.

One side claims the existence of the authority under the Territorial statute, whose construction is free from doubt; the other side denies the existence of the authority and validity of the statute under the Constitution of the United States.

This case is analogous to that of Clayton *v.* Utah, 132 U. S., 632. Under acts of Congress it was claimed that the Governor and Council had authority to appoint a certain class of officers, including the Auditor of Public Accounts. The Legislature had by statute provided a different method of

selecting the Auditor. Pratt claimed under appointment of the Governor, Clayton under the method provided by the Territorial statute. The amount involved was insufficient to give this Court jurisdiction, and such jurisdiction was dependent upon whether there was drawn in question the validity of an authority exercised under the United States.

The contention on one side was that under act of Congress the Governor had the authority to make the appointment, on the other side this authority was denied under the Territorial statute.

This Court held that it had jurisdiction, and affirmed the judgment of the lower Court, holding the validity of the appointment by the Governor, and that the Territorial statute was invalid.

The executive and judicial authority in a Territory is created and conferred in the same manner and by the same act of Congress. Both are alike exercised under the United States. In neither instance is it necessary to give this Court jurisdiction that authority of the officer or tribunal upon all subjects be questioned. In the Clayton case the general executive authority of the Governor was not questioned, but only his power in the particular matter. So in the case at bar, it is not necessary that the general judicial authority of the District Court be questioned, but only the phase of authority, which, without right, it undertook to exercise in this case.

In the Clayton case Mr. Justice Miller used this language (p. 637): "We have no difficulty in holding that the record before us presents a case in which there is drawn in question an authority exercised under the United States within the meaning of the second section. This authority was that exercised by the Governor in the appointment of Arthur Pratt, acting upon the hypothesis that there was a vacancy in that office which he had a right to fill.

"If the legislation of the Territory of Utah vesting this appointment * * in the votes of the people at a popular election, is valid, of course the Governor had no right to make such appointment."

This Court entertained jurisdiction and held the Territorial act invalid.

So in this case the authority drawn in question is that of the District Court, which it undertook to exercise in entering the judgment in this case, and which was forbidden to it by the Constitution.

The validity of the Territorial statute is also involved.

There is nothing in the contention that if this Court has jurisdiction of this case every case tried in the Territorial courts could be brought here.

The distinction between the validity or existence of a given authority under the United States and the erroneous exercise of an authority is a broad one and easily understood.

When a case like the one at bar falls within the former, and the validity of an authority exercised under the United States is fairly open to denial and is denied, the case is one for review by this Court.

But from another point of view this case is rightfully in this Court for review. The authority of the Territorial Legislature to legislate is exercised under the United States.

Clough *v.* Curtis, 134 U. S., 369.

The validity of its attempted authorization of a jury to find a verdict in a suit at common law, by the concurrence of nine members, is in this case directly drawn in question. The *validity* of such authority is denied under the Constitution of the United States.

It is submitted that the motion to dismiss should be denied.

J. L. RAWLINS,
Attorney for Plaintiff in Error.

166-701

UNITED STATES SUPREME COURT, U.S.
FILED.
OCT 31 1896
JAMES H. McKENNEY,
CLERK.

166-701

IN THE SUPREME COURT OF THE UNITED STATES.

October ~~DECEMBER~~ TERM, 1896.

No. 103.

SPRINGVILLE CITY, PLAINTIFF IN ERROR,

vs.

PERRY A. THOMAS AND LAVINIA THOMAS,
DEFENDANTS IN ERROR.

Appeal from the Supreme Court of the Territory of Utah.

BRIEF FOR PLAINTIFF IN ERROR.

J. L. RAWLINS,
Attorney for Plaintiff in Error.

DUPLICATE

IN THE SUPREME COURT OF THE UNITED STATES.

SPRINGVILLE CITY, PLAINTIFF IN ERROR,

vs.

PERRY A. THOMAS AND LAVINIA THOMAS, DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This action was brought by the defendants in error against Springville City, in the First Judicial District Court of Utah Territory, to recover damages for personal injuries alleged to have been caused by the negligence of the City in failing to keep in repair a bridge. At the trial the following was returned as the verdict of the jury:

> "We, the jury empanelled in the above entitled cause, find for the plaintiffs and against the defendant, and we assess the plaintiffs' damage at $2,300.
>
> C. A. GLAZIER, Foreman.
>
> Concurring: C. A. Glazier, Chas. F. Watkins, F. S. Humphries, James Clark, H. W. Davis, C. H. Karen, Joseph Kelly, W. H. Brereton, W. H. Patten.
>
> Dissenting: Alexander Ellis, Chauncey E. Thomas, Jesse Knight.
>
> Filed February 15th, 1893.
>
> B. BACHMAN, Clerk."

At the time the same was presented Springville City, by its counsel, "objected to receiving the same for the reason that the same was not a proper verdict, in that it was not the unanimous verdict of the jury; but the Court overruled said objection and received said verdict, and caused the same to be

entered in this cause." (See Record, page 30.) Thereupon the following judgment was entered by the Court:

> "This action came on regularly for trial. The said parties appeared by their attorneys, Thurman & Sutherland, counsel for plaintiff, and Rawlins & Critchlow and D. C. Johnson for defendant. A jury of twelve persons was regularly empanelled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and, being called, answered to their names, and on their oaths say:
>
> "We, the jury empanelled in the above entitled cause, find for the plaintiffs and against the defendant, and we assess the plaintiffs' damages at $2,300.
>
> C. A. GLAZIER, Foreman."
>
> Concurring: C. A. Glazier, C. F. Watkins, F. S. Humphries, C. H. Karren, James Clark, Jos. Kelly, H. W. Davis, W. H. Brereton, W. H. Patten.
>
> Dissenting: Alexander Ellis, Chauncey E. Thomas, Jesse Wright.
>
> Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is therefore ordered, adjudged and decreed, that the said Perry A. Thomas, and Lavinia M. Thomas, his wife, have and recover from the said Springville, the sum of two thousand, three hundred ($2,300.00) dollars, with interest from this date at eight per cent. per annum, together with said plaintiffs' costs and disbursements incurred in this action, amounting to the sum of one hundred and fifty-four ($154.25) dollars and twenty-five cents.
>
> JOHN W. BLACKBURN, Judge.
>
> Judgment recorded the 15th day of February, A. D. 1893, in Book 3, page 19."

Afterwards on the 10th day of May, 1893, the Court entered the following order:

> "These causes coming on for hearing before the Court on the motions for new trial therein, and the Court being now fully advised herein, orders that upon the judgments herein being reduced $1,000.00, that the motion for new trial be

overruled, otherwise that a new trial be granted in said cases. It is further ordered that plaintiffs have to and including May 17th to accept or reject the same.

(Signed) JOHN W. BLACKBURN, Judge.

Dated May 10th, 1893."

Afterwards on the 15th day of May, 1893, the following consent to reduction of the judgment was filed in said Court:

"Now comes the plaintiffs herein and consent that judgment rendered herein on February 15th, 1893, in favor of plaintiffs and against defendant, be reduced to $1,300.00, making a reduction of $1,000.00 on said judgment.

THURMAN & SUTHERLAND,
Attorneys for Plaintiffs.

Dated May 15th, 1893.

Endorsed: Title of Court and Cause. Certified copy of Judgment Roll. Filed February 18th, 1893. B. Backman, Clerk, by F. Backman, Deputy Clerk."

ASSIGNMENTS OF ERROR.

The plaintiff in error makes the following

ASSIGNMENTS OF ERROR:

First.—The Court erred in overruling the objection of the defendant Springville City to, and in receiving and causing to be filed and entered the verdict of the jury and in entering judgment thereon, for the reason that the same was not the unanimous verdict and that the plaintiff in error was entitled to the unanimous verdict of the jury under and by virtue of Article VII of the Amendments to the Constitution.

Second.—The Supreme Court of Utah erred in overruling the foregoing assignment of error and in affirming the judgment of the District Court.

ARGUMENT ON MOTION TO DISMISS.

Article VII of the Amendments to the Constitution provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be

> preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

In a District Court of Utah, created by Act of Congress, the defendant in error brought a suit at common law against Springville City for the recovery of damages for personal injury. The case was tried by a jury, nine members of which concurred in finding a verdict for $2,300.00, in which three members refused to concur. Upon this verdict, against the objections of the city, the Court entered judgment.

Whether the Court had authority to do this is the question directly involved in this case. The Supreme Court of the Territory held that it had such authority.

The validity of this authority—thus exercised under the United States—is directly brought in question.

The contention of the defendant in error is that the District Court had this authority under the Act of the Territorial Legislature set out in the Brief on the other side.

The plaintiff in error contends that such authority is forbidden by the foregoing provision of the Constitution.

This Court has jurisdiction of this case, without regard to the amount involved, "if there be drawn in question the validity of an authority exercised under the United States," whether the decision of the lower Court was for or against the authority.

Baltimore & Potomac Rd. Co. v. Hopkins, 130 U. S., 210.

Clayton v. Utah, 132 U. S., 632.

Clough v. Curtis, 134 U. S., 361.

The first of these decisions draws the distinction between the question of the validity of the statute or authority, and the question of the construction of the statute or the regularity of the exercise or administration of a conceded authority. In the former case this Court has jurisdiction; in the latter not.

The cases upon which counsel on the other side relies all belong to the latter class, as does the case of Linford v. Ellison, recently decided.

The case at bar clearly belongs to the former class.

We assert—and that is the very question involved—that the District Court had absolutely *no* authority to enter judgment in this suit at common law, except upon the verdict concuraed in by all the members of a jury of twelve men. It is not a question as to the erroneous exercise of an authority nor of the construction of a statute.

The validity—the very *existence* of the authority—of a tribunal acting under the Constitution and laws of the United States is involved and questioned.

One side claims the existence of the authority under the Territorial statute, whose construction is free from doubt; the other side denies the existence of the authority and validity of the statute under the Constitution of the United States.

This case is analogous to that of Clayton v. Utah, 132 U. S., 632. Under Acts of Congress it was claimed that the Governor and Council had authority to appoint a certain class of officers, including the Auditor of Public Accounts. The Legislature had, by statute, provided a different method of selecting the Auditor. Pratt claimed under appointment of the Governor, Clayton under the method provided by the Territorial statute. The amount involved was insufficient to give this Court jurisdiction, and such jurisdiction was dependent upon whether there was drawn in question the validity of an authority exercised under the United States.

The contention on one side was that under Act of Congress the Governor had the authority to make the appointment, on the other side this authority was denied under the Territorial Statute.

This Court held that it had jurisdiction, and affirmed the judgment of the lower court, holding the validity of the appoint-

ment by the Governor, and that the Territorial Statute was invalid.

The executive and judicial authority in a Territory is created and conferred in the same manner and by the same Act of Congress. Both are alike exercised under the United States. In neither instance is it necessary to give this Court jurisdiction that authority of the officer or tribunal upon all subjects be questioned. In the Clayton case the general executive authority of the Governor was not questioned, but only his power in the particular matter. So in the case at bar, it is not necessary that the general judicial authority of the District Court be questioned, but only the phase of authority, which, without right, it undertook to exercise in this case.

In the Clayton case Mr. Justice Miller used this language (p. 637): "We have no difficulty in holding that the record before us presents a case in which there is drawn in question an authority exercised under the United States within the meaning of the second section. This authority was that exercised by the Governor in the appointment of Arthur Pratt, acting upon the hypothesis that there was a vacancy in that office which he had a right to fill.

"If the legislation of the Territory of Utah, vesting this appointment * * in the votes of the people at a popular election, is valid, of course the Governor had no right to make such appointment."

The Court entertained jurisdiction and held Territorial Act invalid.

So in this case the authority drawn in question is that of the District Court, which it undertook to exercise in entering the judgment in this case, and which was forbidden to it by the Constitution.

The validity of the Territorial Statute is also involved.

There is nothing in the contention that if this Court has jurisdiction of this case every case tried in the Territorial courts could be brought here.

The distinction between the validity or existence of a given authority under the United States, and the erroneous exercise of an authority, is a broad one and easily understood.

When a case, like the one at bar, falls within the former, and the validity of an authority exercised under the United States is fairly open to denial and is denied, the case is one for review by this Court.

But from another point of view this case is rightfully in this Court for review. The authority of the Territorial Legislature is exercised under the United States.

Clough v. Curtis, 134 U. S., 369.

The validity of its attempted authorization of a jury to find a verdict in a suit at common law, by the concurrence of nine members, is, in this case, directly drawn in question. The *validity* of such authority is denied under the Constitution of the United States.

In Ferry v. King County, 141 U. S., 672, this Court dismissed the writ of error because the validity of the Territorial statute was not drawn in question. It is apparent from the language of the opinion that had the lower Court decided any question before it in such manner as denied the validity of the sections of the Code quoted, this Court would have entertained jurisdiction of that case.

It is submitted that the motion to dismiss should be denied.

ARGUMENT ON THE MERITS.

The Seventh Article of the Amendments to the Constitution is a limitation upon federal authority, whether exercised within or under a Territorial government or otherwise. It was also a guaranty of the right secured to all persons against interference,

either directly or indirectly, by the government of the United States.

Callan v. Wilson, 127 U. S., 540.

In Spies v. Illinois, 123 U. S., 169, this Court used the following language, speaking with reference to a statute of the Territorial Legislature: "As that was a Territorial Statute passed by the Territorial Legislature for the government of the Territory over which the United States has exclusive jurisdiction, it came directly within the operation of the Sixth Amendment, which guaranteed to Haupt a trial by an impartial jury." Of course the Seventh Article of the Amendments stands upon the same footing as the Sixth. It is not open to question that our ancestors, both in this country and in England, insisted on unanimity as of the essence of the verdict. Unanimity was an essential feature of the trial by jury, as it was understood at the time these words were inserted in and made a part of the Constitution. That there should be an agreement of the entire panel of twelve jurors to render a valid verdict, was so thoroughly settled in the early period of the formation of the English system of Jurisprudence, that the significance and meaning of the right of trial by jury as secured by the Constitution should not now be considered open to question. It would not be except for the anomalous decision in the case of Hess v. White, rendered by the Supreme Court of Utah, and the subsequent rulings by that Court following this decision. This decision seems to proceed upon the theory that courts may abrogate or modify constitutional provisions to suit their own ideas of convenience, and to make them compatible with the advancement of civilization. In the case of Winsor v. Reg. 6 Best. & S., 170, L. R. 1 Q. B., 289, the Lord Chief Justice states "that all our ancestors insisted on unanimity as the essence of the verdict." In Campbell v. Woldredge, G. Abec., Pt. 2d, 132, it is said that each member of the jury must agree to the verdict. The verdict found by a majority is illegal.

In Work v. State, 2 O. St., 296, after an elaborate discussion of the question, the Court held that the jury must be unanimous to render a verdict, this right] being guaranteed by the provision of the Constitution to the effect that the right of trial by jury shall remain inviolate.

The opinion of the Justices, 41 N. H., 550, is an elaborate consideration of this question, with the conclusion that the Legislature cannot provide that a number of the petit jury less than the whole can render a valid verdict where the Constitution gives the right of trial by jury. The same principle is recognized in the numerous cases relating to the polling of the jury. In all the Territorial courts where the question has arisen, outside of Utah, it has been held incompetent for the Territorial Legislature to authorize a verdict where the jury of twelve persons were not unanimous. It was so decided in

Kleinschmidt v. Dunphy, 1 Mont., 118.
Aylesworth v. Reece, 1 Mont., 200.
Branford v. Territory, Okla., 366.
Carroll v. Byers, et al., (Ariz.,) 36 Pac. Rep., 499.

See also to the same effect

Anderson v. Caldwell, 91 Ind., 454.
Haynes v. Levin, 51 Pa. State, 414.
Cooley Con. Lim. (5th Ed.), 392-3.
Copp v. Heinnaker, 55 N. H., 179.
Railroad Co. v. Adams, 33 Fla., 608.
S. C. 24 L. R. A., 272 and note.

Judge Cooley, in discussing this question, says, "Many of the incidents of a common law trial by jury are essential elements of the right. The jury must unanimously concur in a verdict. This is a very old requirement in the English common law, and it has been adherred to, notwithstanding very eminent men have assailed it as unwise and inexpedient."

In 2d Story on the Constitution, Section 1779 (4th Ed.), the origin and nature of this right is considered. In note 2 to

this Section, prepared by Judge Cooley, is found this language: "A trial by jury is generally understood to mean *ex vi termini* a trial by a jury of *twelve men*, impartially selected, who must *unanimously* concur in the guilt of the accused before a legal conviction can be had. Any law, therefore, dispensing with any of these requisites may be considered unconstitutional."

See also authorities thereto cited.

It is difficult to see where the line would be drawn so as to preserve even a semblance of the Constitutional right of jury trial if innovations like that attempted by the Utah Legislature be permitted. If nine jurors may unite in returning a verdict, why may not seven? Indeed, upon this principle there is no reason why a Territorial Legislature might not provide that a finding of three or five jurors, approved by the Court, should stand as the verdict of the jury.

We insist that the judgment of the lower court should be reversed.

J. L. RAWLINS,

Attorney for Plaintiff in Error.

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SUPREME COURT U. S.
FILED
OCT 31 1896
JAMES H. MCKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 103.

SPRINGVILLE CITY, PLAINTIFF IN ERROR,

vs.

PERRY A. THOMAS AND LAVINIA THOMAS, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF UTAH TERRITORY.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

PARLEY L. WILLIAMS,
Attorney for defendants in error.

Star Printing Co., 143 S. West Temple St.

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BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

I.

ON MOTION TO DISMISS.

This appeal involves preliminarily a question of jurisdiction. On December 18, 1894, the defendants in error filed their motion to dismiss the writ of error on the grounds, first: that no federal question is involved; second, that the matter in dispute, exclusive of costs does not exceed the sum of five thousand dollars; third, no question is presented involving the validity of any patent or copyright, nor is there drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States.

The plaintiff in error claims that the writ of error was properly allowed and that this court has jurisdiction under

the provisions of the Act of Congress passed March 3, 1885, regulating appeals from the Supreme Courts of the several Territories to the Supreme Court of the United States, Section 2 of which act provides that an appeal may be allowed irrespective of the amount in dispute where there is drawn in question the validity of an authority exercised under the United States. It is claimed that upon this appeal there is involved the validity of an authority exercised under the United States, to-wit:

1.—The authority of the Legislature of Utah Territory to pass a certain act providing for a verdict by the concurrence of three-fourths of the jury.

2.—The authority of the district court to enter judgment upon a verdict so rendered.

Our contention upon the motion to dismiss is, first: that the validity neither of any act of the legislature, nor of the court, nor of any authority exercised by either, under the United States, was drawn in question in the trial court or in the supreme court of the Territory; second, that assuming for the purpose of the argument that the validity of an act of the Territorial Legislature was challenged and that the validity of the act of the court in rendering judgment upon a majority verdict of the jury was drawn in question, neither involves the validity of an authority exercised under the United States, within the meaning of the Act of March 3, 1885.

1.—The rule is well settled that before this court can exercise jurisdiction upon the questions involved in this appeal, it must appear from the record that the validity of an authority exercised under the United States was drawn in question in the trial court and in the Supreme Court of the Territory.

If it were not necessary that the objecting party should point out specifically and directly, in the lower courts,

wherein the validity of an authority exercised under the United States was drawn in question, it would allow the lower courts to rule with eyes closed to the real question, or with reference to general principles only, and then permit counsel, for the first time, in this court to point out what authority was *intended* to be drawn in question by the general objection. Such a rule would be at war with the whole scheme of federal appeals; it would permit counsel to search the record after trial and to engraft upon a general objection a federal question if it appeared upon the chastened reflection of the defeated party that such a question *might* have been presented if it had suggested itself in time.

A careful examination of the record does not disclose that the validity of an authority exercised under the United States or the validity of any act of the legislature, or the power of the court to enter a judgment upon the verdict, was called to the attention of the district court or of the supreme court of the Territory. All that is shown by the record bearing upon the question is this:

1. "On February 15, 1893, the jury presented a verdict in the case of Perry A Thomas and Lavinia Thomas vs. Springville, in favor of the plaintiffs for twenty-three hundred dollars, which was concurred in by ten only of the jurors and dissented from by the remaining two. At the same time the same jury presented a verdict in the case of Perry A. Thomas vs. Springville (tried at the same time but not involved in this appeal) for one hundred and twenty dollars, concurred in by eleven and dissented from by one of the jurors. Defendant objected to receiving each verdict for the reason that the same was not a proper verdict in that it was not the unanimous verdict of the jury; but the court overruled said objection and received said verdict and caused the same to be entered in this cause."

Transcript p. 30.

2. In the statement on motion for new trial this is assigned as error in the following language:

> "The court erred in overruling the objection of the defendant to and in receiving and causing to be filed and entered the verdict of the jury in the case of Perry A. Thomas and Lavinia Thomas vs. Springville City."
>
> Trans. p. 32.

3. In the Supreme Court it does not appear that the question was even suggested. The opinion of that court does not refer to it. It was not considered. (Tran. page 31-37.) The concluding paragraph of the opinion is:

> "Many other errors were assigned in the record but we have examined all that were discussed in the appellant's brief and not waived at the hearing. Upon the whole record we find no reversible error. The judgment of the district court is affirmed with costs."

It will be observed therefor that it is nowhere suggested either in the trial court or the supreme court that the validity of any authority exercised under the United States is drawn in question. In the lower court, the only objection is that the verdict is not unanimous. The assignment of error is that the court erred in overruling this objection.

The language of the Supreme Court implies that even this assignment was waived on appeal.

The rule is established that under Section 709, Rev. Stats. U. S., allowing an appeal from a State Supreme Court where there is drawn in question the validity of an authority exercised under the United States and the decision is against its validity, it must appear that the question was actually raised and decided. It is not enough that it might have been or ought to have been raised.

The Victory, 6 Wall. 382.

Gibson vs. Chauteau, 8 Wall. 314.

Powell vs. Brunswick County, 150 U. S. 433, 439.
S. Boom Co. vs. W. B. Boom Co., 110 U. S. 57.

The language conferring jurisdiction of appeals from the Territorial courts simply requires that the validity of an authority shall be drawn in question, not that it shall be decided in any particular way. It is therefore necessary only that the record in this case should show that the question was raised. It is immaterial how it was decided. This court should, however, be able to see from the record that the question was presented to the Territorial courts and that they had the opportunity of passing upon it. To this extent there is no reason why the rule announced with reference to appeals from State courts should not apply in cases from the Territorial courts and this seems to be the opinion of this court.

Lownsdale vs. Parrish, 21 How. 290.

That was an appeal from the Supreme Court of the Territory of Oregon. An act of Congress authorized an appeal

> "Where the Constitution of the United States or an act of Congress or a treaty of the United States is *brought* in question."

The only practical difference between that provision and the one under which this writ of error is sought is that the word "drawn" is used instead of the word "brought." They mean, in this connection, the same thing. This court dismissed the appeal in that case saying:

> "Neither the Constitution of the United States nor an act of Congress nor a treaty was '*brought* in question' in the lower court; neither side could have legitimately raised such a question and called for its decision; and to give this court jurisdiction of the *case* in this instance the question must have been raised and decided in the lower courts and it must so appear on the record."

In the case at bar it does not appear that the validity of an authority exercised under the United States was 'drawn' in question and to give this court jurisdiction of the *case* the question must have been raised and decided in the lower courts and it must so appear on the record.

In the case of Linford against Ellison, 155 U. S. 503, and the other cases there cited, the court holds that the validity of an authority is drawn in question when the existence or constitutionality or legality of such authority is denied and *the denial forms the subject of direct inquiry.*

In the brief of plaintiff in error the contention is that the validity of the authority of the district court to render judgment on the verdict is drawn in question, but no such question was even hinted at until the case came to this court. In the district court the only objection which was made was to receiving the verdict, for the reason that it was not the unanimous verdict of the jury. No objection was made to the entry of the judgment upon this verdict.

2. Even if the case involves the validity of an act of the Territorial Legislature there is not drawn in question thereby the validity of an authority exercised under the United States.

It is claimed by the plaintiff in error that inasmuch as the Territorial Legislature exercises its authoritory under the United States, and one of its acts is challenged as being invalid, that there is thus drawn in question the validity of an authority exercised under the United States. There is a marked difference between the act of Congress providing for appeals and writs of error from the Territorial supreme courts, and the law allowing appeals and writs of error from the State supreme courts. In the latter, the jurisdiction applies in a much more numerous class of cases

than in the former.

Rev. Stats. U. S., Sec. 709.

A comparison of them however, we think, will reflect some light on the question at bar. Under the latter act an appeal is proper; first, where there is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity; or, second, where there is drawn in question the validity of a statute or an authority exercised under any State on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity; or, third, where any right, title, privilege or immunity is claimed under the constitution of or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the right, title, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority. The object of the statute in all three cases seems to have been the same, viz: to allow a review by the Supreme Court of the United States whenever the force or applicability of the national constitution, legislation or authority was denied by the State Supreme Court. It was no part of the scheme to allow a review where the effect of the decision of the State Supreme Court was to extend or uphold the constitution, legislation or authority and not to restrict or deny the same.

If the law of a State were challenged on the ground of its repugnance to the constitution or statutes of the United States and the State court held it invalid, or if the validity of an authority exercised under the United States was questioned and the authority was upheld by the State

Supreme Court, no review by the Federal Supreme Court was contemplated.

Suppose, therefore, Utah Territory having become a State, the Supreme Court of the State, following the Territorial Supreme Court, should hold the act of the legislature valid and an appeal from such decision should be taken; if upon such appeal it should be held that the language "where there is drawn in question the validity of an authority exercised under the United States" applied to a case where the validity of a Territorial law was drawn in question, the decision of such State Supreme Court affirming the validity of the Territorial law would be a decision in favor of the validity of the authority exercised under the United States, and under the provisions of Section 709 would not be subject to review by this court; but if the question before the State Supreme Court was as to the validity of a State law and the decision was in favor of the validity of such law, then it would be reviewable, and we would be confronted with the anomaly of the Supreme Court of the United States reviewing the question of the validity of a *Territorial* law where the Supreme Court of the State had decided against its validity, and reviewing the validity of a *State* law where the State Supreme Court had decided in favor of its validity, and *vice versa*.

Such a construction would be at war with the purpose of the statute. By the words, "where is drawn in question the validity of an authority exercised under the United States," it was intended to embrace a case where there was drawn in question the validity of the primary authority itself as distinguished from an act of such authority. If this is the proper construction of this language in Section 709, why should not the same language in the act of 1885 providing for appeals from Territorial courts receive the same construction? And if so, an appeal would not be

authorized in a case where the validity of the law of a Territorial legislature was drawn in question; and to this effect are the decisions of this court.

In Miners' Bank vs. State of Iowa, 12 How. 1, the facts were: The Territory of Wisconsin had created a corporation called the Miners' Bank of Dubuque. After the separation of Iowa from Wisconsin, the legislature of Iowa Territory repealed the act incorporating the bank. It was claimed by the plaintiffs in error that this latter act was unconstitutional "as a law arbitrarily abrogating the charter of the bank and therefore a law impairing the obligation of a contract."

After the Territory of Iowa became a State, the question came before the State supreme court. This court held the law valid and the case went by appeal to the Supreme Court of the United States. This court, however, held that an appeal would not lie, and in the course of the decision, referring to the 25th section of the law establishing the judicial courts of the United States, says (page 6):

> "By recurrence to that section it will be perceived in order to give the corrective power to this tribunal, that by the decision of the State court there must have been drawn in question the validity of a statute or of an authority exercised under the United States, and the decision must be against their validity, etc.
>
> "By comparison of the record before us with the section of the judiciary act above quoted, we think it nowhere apparent that there has been by the decision of the court of Iowa, drawn in question the validity of a statute or of an authority exercised under the United States, much less that there has been a decision against the validity of either."

The Court, it seems to us, very clearly announces its opinion, therefore, that the fact that there is drawn in question the validity of a Territorial law does not draw in question the validity of an authority exercised under the United States; and that a decision upholding the validity of

a Territorial law is not a decision against the validity of an authority exercised under the United States.

See also,

Messenger v. Mason, 10 Wall. 507 (510).

An authority directly in point, however, and, if followed, conclusive of the question, is the case of Smith vs. Adams, 130 U. S. 167. There the court construing Section 2 of the Act of Congress of March 3. 1885, declared that to challenge the validity of a Territorial law did not present a question for the review of the Supreme Court within the meaning of the act. The appeal in the case referred to was from the Supreme Court of the Territory of Dakota. The facts were that the political code of Dakota, in force in 1886 providing for the organization of counties and location of county seats, authorized certain commissioners to locate the county seat temporarily and until an election was held and a permanent county seat designated by a majority of the votes cast at such election. On the thirtieth of July, 1886, Congress passed an act prohibiting the passage of local or special laws by the Territories of the United States and among other things enacted that the legislatures of such Territories should not pass local or special laws locating or changing county seats, and declaring that such laws should be null and void. Brown County in Dakota was organized under the provisions of the political code, and the city of Columbia was designated by the commissioners as the temporary county seat, and it remained such county seat until some time in 1887, no other place having been designated by the voters of the county. In March, 1887, the Territorial legislature passed an "act to provide for the relocation of county seats in counties where county seats have been located by vote, less than a majority of all the electors voting thereon." Section 1 of

this act provided for holding a special election of the qualified voters of such counties having a population of twelve thousand and upwards, where the permanent county seat had not been established under the provisions of the political code, at a time designated, at which election the question of the relocation of the county seat should be voted upon.

Under this act an election was held in Brown County and a majority of the votes were cast in favor of the City of Aberdeen as the county seat. Under a law of the Territory, an elector brought an action to contest the validity of this election upon the ground that the act of the Territorial legislature was in conflict with the act of Congress of July 30, 1886, prohibiting local or special legislation locating or changing county seats; that the language of the Territorial act, though general, was drawn so as to be applicable to but one county, no other county coming within its provisions, and that this fact was known at the time to the legislature, and that the object of passing the act was to evade and nullify the act of Congress. The supreme court of the Territory held that the act of the Territorial legislature was in conflict with the act of Congress prohibiting special legislation, and from this decision of the Territorial court an appeal was taken to this court. A motion to dismiss the appeal was submitted, on the ground, among others—

> "That no question is presented involving the validity of any patent or copyright, nor is there drawn in question the validity of a treaty or statute of or authority exercised under the United States."

This court after quoting the provisions of the act of Congress of March 3, 1885, say:

> "The objection that no federal question is involved undoubtedly has reference to the second section of the above act, which

> provides that the appellate jurisdiction of this court over cases from the Territorial courts shall not be determined by the amount in dispute if the validity of a treaty or statute of or authority exercised under the United States is drawn in question, but that in such cases an appeal or writ of error may be brought without regard to the sum or value in dispute. *No such question being involved, our appellate jurisdiction in this case depends upon whether the amount in dispute exclusive of costs exceeds the sum designated.*"

The court held that the jurisdictional amount was not involved, and upon this and other grounds dismissed the appeal.

In the recent case of Linford v. Ellison, 155 U. S. 503, the same rule is announced.

In that case the legislature of Utah Territory had passed an act which empowered the City of Kaysville to assess taxes upon agricultural lands within the corporate limits of the city but beyond the range of municipal benefits.

This law it was claimed was opposed to the fifth amendment of the federal constitution, so that the constitutionality of the law was involved. The supreme court of the Territory held that the law was unconstitutional and void. This court, however, dismissed the appeal, holding that the decision of the supreme court—

> "Involved the construction of the organic law and the scope of the authority to legislate conferred upon the Territorial legislature; but that the validity of that authority and of the statute [the organic act passed by Congress] was not drawn in question."

The court reaffirmed its prior decisions in the cases of Lynch vs. United States, 137 U. S. 280, 285; Baltimore & Potomac Railroad vs. Hopkins, 130 U. S. 210, 226; South Carolina vs. Seymour, 153 U. S. 353, which held in effect that:

> "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed."

The validity of an act done by an authority whose rightful existence was conceded was challenged in each of these cases. In the case at bar, the validity of the primary authority, to-wit, the existence and jurisdiction of the legislature of Utah Territory to legislate generally, is not drawn in question. It is merely claimed that one of its acts is erroneous.

If it had been intended by the statute quoted to allow an appeal or writ of error in every case where the validity of an act of a person or body acting under the authority of the United States was drawn in question, there would be no limit to the cases to which it would apply. If the language of the statute applies to the Legislative Assembly of the Territory, it will apply equally to the judicial department, becauses each exercises its authority equally under the United States. Such a construction would lead to absurd results, as this court very clearly points out in the case of Snow vs. United States, 118 U. S. 346.

In this case the appellant Snow had been three times convicted of the same offense, and the court which tried him had therefore violated one of the plainest provisions of the Constitution of the United States. (See case in re Snow, 120 U. S. 274). It was claimed by the plaintiff in error that as the court exercised its authority under the United States and that as such authority had been exercised unlawfully to deprive him of his liberty, that therefore the validity of an authority exercised under the United States was involved; but this court says (page 352):

> "In the present case, the validity of a statute of the United States is not drawn in question. No such question is pre-

sented by the bill of exceptions or the request for instructions or the exceptions to the charge or anywhere else in the records, nor is the validity of an authority exercised under the United States drawn in question. Plaintiff in error says that the construction of the act of 1882 is drawn in question and also the authority exercised under the United States by which he was tried and convicted; that the authority of the United States is invoked to deprive him of his liberty in a court established by Congress acting solely by federal power, and that the question is whether the authority exercised by the court under the act of 1882 is a valid authority within the scope of the act, because the contention is that the court misconstrued the statute and acted beyond the authority which it conferred. The authority exercised by the court in the trial and conviction of the plaintiff in error is not such an authority as is intended by the act. The validity of the existence *of the court and its jurisdiction over the crime named in the indictments are not drawn in question.* All that is drawn in question is whether there is or is not error in the administration of the statute. The contention of the plaintiff in error would allow a writ of error from this court in every criminal case in the Territory where the prosecution is based upon a statute of the United States, and indeed it might go still further, for the authority of every court siting in the Territory is founded on a statute of the United States. From the fact that a given criminal case involves the construction of a statute of the United States, it does not follow that the validity of 'an authority exercised under the United States' is drawn in question."

The distinction we are contending for is clearly shown by a comparision of the cases already cited, with Clough vs. Curtis, 134 U. S. 369.

The facts in that case were that the legislature of the Territory of Idaho had been in session for the full period of sixty days, to which time the life of the assembly had been limited by the act of Congress. An hour after the expiration of the sixtieth day the president of the council declared the council adjourned without day, directed the

clerk of the council to enter the order in the minutes, and thereupon the members of the council dispersed. Subsequently they re-assembled, elected a president *pro tem* and proceeded, with the help of the house, which had been similarly organized, to pass a number of acts. There was a direct proceeding which questioned the valid existence of this legislature assembled under these circumstances. The Supreme Court of the United States thought it was a proper case for an appeal and said;

> "In each case is *directly* drawn in question the *lawful existence* of those bodies as the council and house of representatives of the Territory and consequently the authority which they have assumed as the legislative assembly of the Territory to exercise under the United States."

From the authorities referred to and quoted, this rule may therefore be deduced: That a writ of error will lie where it is claimed that a legislative assembly of a Territory or other person or body deriving its authority from the United States have no power to *act at all* and not merely where the power to act in a *particular way* is challenged.

If it had been intended to allow a review of the legislation of a Territory by the Supreme Court of the United States, it would have been easy for Congress to have conferred the jurisdiction by plain and explicit language.

Farnsworth vs. Montana, 129 U. S 113.

So if it had been understood by the language "an authority exercised under the United States," a law of the Territory could be reviewed by this court, the same language would cover an act of Congress, because Congress exercises its authority under the United States, and the enumeration of a "statute of the United States" in the same section would have been superfluous.

In section 709, Rev. Stats. U. S., Congress was careful in every instance to enumerate as the subject of appeal,

cases involving the validity of a *statute* as well as an *authority* exercised under any State, and a *statute* as well as an *authority* exercised under the United States. It would seem, therefore, that the failure to provide for a writ of error or appeal where the validity of a *territorial law* was involved was deliberate and intentional.

It was intended to leave the supervision of such laws where it had always rested, viz: with Congress itself.

Miners' Bank vs. Iowa, 12 How. 1, (7.)

Congress has ample power to control and supervise legislation by the Territories. It may declare an act void at its pleasure.

National Bank vs. County of Yankton, 101 U. S. 129, (133.)

It is expressly provided with reference to Utah Territory that—

"All the laws passed by the Legislative Assembly and Governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect."

(Organic Act of Utah, Section 6; approved Sept. 9, 1850.)

In appellant's brief the cases of Clough vs. Curtis, 134 U. S. 361, and Clayton vs. Utah, 132 U. S. 632, are referred to as upholding the jurisdiction of the court.

The first case we have already discussed.

The Clayton case is distinguishable from the case at bar.

In deciding that case, this court is careful to limit its right to review the case on appeal to the ground that the validity of an authority of the Governor *expressly conferred upon him* BY THE UNITED STATES under the Organic Act of the Territory, is drawn in question. In addition to the

language quoted by plaintiff in error in its brief, we call the court's attention to what is stated at page 638, to-wit:

> "We are therefore very clear that as the Supreme Court of the Territory of Utah based its decision upon the power conferred upon the Governor by the Seventh Section of the Organic Act of Utah to make appointments to office, this power was drawn in question and gives the defendant Clayton a right to have the judgment of this court upon it."

The validity of the Territorial law providing for appointments was also involved in the case but this court took jurisdiction of the appeal, not by reason of, but in spite of this fact, and because of the existence in the case of the question just discussed.

3. The second contention of counsel that the authority of the district court of the Territory to enter the judgment in question is involved and that the court deriving its authority from the United States there is thereby involved the validity of an authority exercised under the United States, we think is less tenable than the contention just discussed. In addition to the reasons already given, to show that an act of a Territorial legislature cannot be reviewed by this court under the act of 1885 which applied with equal if not greater force to an act of a court, we make this further contention, **that the authority conferred on a court to hear and determine cases in a Territory is not the kind of authority referred to in the act of 1885.** In the case of Snow vs. United States, 118 U. S., 353, this precise question was involved, and the court discussing it says:

> "The authority exercised by the court in the trial and conviction of the plaintiff in error is not such an 'authority' as is intended by the act. The validity of the existence of the court, and its jurisdiction over the crime named in the indictments, and over the person of the defendant are not drawn in question. All that is drawn in question is

whether there is or is not error in the administration of the statute. The contention of the plaintiff in error would allow a writ of error from this court in every criminal case in a Territory where the prosecution is based upon a statute of the United States; and, indeed, might go still further, for the authority of every court sitting in a Territory is founded on a statute of the United States. From the fact that a given criminal case involves the construction of a statute of the United States, it does not follow that the validity of an authority exercised under the United States is drawn in question. There is a decision of this court on this point in Bethell vs. Demaret, 10 Wall. 537. The 25th section of the Judiciary Act of 1789, allowed a writ of error from this court to the highest court of a state, 'where is drawn in question the validity of a statute of or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of such their validity. The case referred to was a writ of error to the highest court of a State and it was contended that the court, in rendering the decision complained of, acted under the authority of the State; and so there was drawn in question an authority exercised under the state, which in the particular case, impaired the obligation of a contract, and was repugnant to the Constitution of the United States, and the decision was in favor of the validity of such authority. To this view, this court speaking by Mr. Justice Nelson gave this answer: 'The authority conferred on a court to hear and determine cases in a State is not the kind of authority referred to in the 25th Section; otherwise, every judgment of the Supreme Court of a State would be re-examinable under the section.' "

In this case, at most, the plaintiff in error simply denies the rightfulness of the ruling of the court in receiving the verdict of the jury against his objection, which within the principle of the cases just referred to does not draw in question the validity of an authority itself.

We therefore insist that the motion to dismiss, upon either or all of the three grounds just discussed should be granted.

II.

On the Merits.

If the court shall pass the question of jurisdiction, the contention of appellant is that the Territorial law allowing a majority verdict to be rendered by the jury is unconstitutional because opposed to the Seventh Amendment

This is the only assignment of error made by appellant and the only question discussed in his brief on the merits, so that we shall confine ourselves to the question of whether or not the Territorial law is opposed to the Seventh Amendment. There are three answers to appellants' contention.

1. **The effect of the Seventh Amendment is to secure a jury trial in United States Courts alone and as Territorial Courts are not United States Courts the Seventh Amendment is not applicable to a Territorial Statute.**

The language of the Seventh Amendment is that—

> "In suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved."

It does not provide that no law shall be passed impairing the right of trial by jury. By its language it would seem to be intended to apply to the judicial department and only incidentally to the legislative to the extent that it legislates for the government of the courts. It is intended as a restriction upon some court or courts, and the authorities place it beyond question that it applies exclusively to the Federal Courts under the Constitution. The Territorial Courts are in no sense United States Courts nor constitutional courts; they are exclusively the creatures of Congress not recognized nor provided for by the Constitution.

How then can a provision of the Constitution restricting the courts of the Constitution, have any reference to courts which have no constitutional existence?

The object of the amendment was to check the power of the Federal Government in its operation through the Federal Courts and it was not intended to restrain or fetter the local governments, either State or Territorial.

In Walker vs. Sauvinet, 92 U. S. 92, Chief Justice Waite said, referring to article seven of the amendments:

> "This, as has been many times decided, relates only to trials in the courts of the United States."

See also,

Twitchell vs Commonwealth, 7 Wall. 326, and cases cited.

The purpose of this amendment was to preserve trials by jury in United States courts in certain civil cases, it being apprehended that such right might be denied to citizens in such courts at some future time; this imposed duty, neither in spirit nor letter, is designed to secure such trial in other than United States courts.

It is well settled that Territorial courts are not United States courts but merely legislative courts.

In 9 How. 242, Benner vs. Porter, the court said:

> "The distinction between Federal and State jurisdictions, under the Constitution of the United States, has no foundation in these Territorial governments; and consequently, no such distinction exists, either in respect to the jurisdiction of their courts, or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts; Congress, in the exercise of its powers in the organization and government of the Territories, combining the powers of both the Federal and State authorities. There is but one system of government or of laws operating within their limits as *neither is subject to the constitutional provisions in respect to State and Federal jurisdic-*

> *tion.* [The Italics are ours.] They are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are creations, exclusively, of the legislative department and subject to its supervision and control. Whether, or not, there are provisions in that instrument which extend to and act upon these Territorial governments, it is not now material to examine. We are speaking here of those provisions that refer particularly to the distinction between Federal and State jurisdiction."

See also,

13 Wall. 434, Clinton vs. Englebrecht.

In the last case, at page 447, the court said:

> " There is no Supreme Court of the United States, nor is there any District Court of the United States, in the sense of the Constitution in the Territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the constitution or the general government. The courts are the legislative courts of the Territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States "

Therefore, as the Seventh Amendment only relates to United States Courts, and as Territorial Courts are not United States Courts, it conclusively follows that the Seventh Amendment does not operate to secure jury trials in Territorial Courts.

2. The second answer is:

That the Seventh Amendment has no greater effect in a Territory than it has in a State, and such Amendment does not guarantee jury trials in a Territory when they are not guaranteed within a State.

Congress governs the Territories under Sub. 2 of Sec. 3, Art. 4 of the Constitution, which provides that

"The Congress shall have power to . . . make all needful rules and regulations respecting the Territories . . . belonging to the United States; . ."

The power of Congress under this clause is variously illustrated in the cases:

101 U. S. 133, National Bank vs. County of Yankton.

98 U. S. 153, Reynolds vs United States.

136 U. S. 42-4, Mormon Church vs. United States.

95 U. S. 98, Good vs. Martin.

This court has held that the Seventh Amendment is not applicable to trials in the court of claims, because such suits *are not suits at common law*, within the true meaning of the Constitution.

102 U. S. 439-40, McElrath vs. United States.

The general conclusion to be drawn from all these cases is: That Congress under this clause may govern the Territories practically as it sees fit; may give them a very limited or very liberal form of government, or none at all; may give them one court, or many courts; may give them power to enact laws, or withhold this power entirely, and itself legislate, or refuse to legislate at all; may give or withhold local self-government; may appoint all officers, or a part of them, or none of them; may authorize all officers to be elected, or none of them; may make void Territorial legislative acts, which otherwise would be valid, and *vice versa*; courts in Territories, though created by Congress are not United States courts, and not subject to the obligations of such courts; this enumeration might be continued indefinitely. In the case above cited, 136 U. S. 44, Justice Bradley says:

"Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of per-

> sonal rights which are formulated in the Constitution and its amendments; but those limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."

But the Seventh Amendment is certainly not one of those "fundamental limitations" to be applied in Territorial courts, but only to be applied in United States courts.

Congress has supreme power over the Territories and their inhabitants; it has the same power of legislation over the Territories as the people of a State have in framing the fundamental law of the State. This was declared in the case of National Bank vs. Yankton, 101 U. S. 129, in the following language:

> "Congress may not only abrogate the laws of a Territorial legislature but it may itself legislate directly for the local government; it may make a void act of the Territorial legisture valid and a valid act void. In other words it has full and complete legislative authority of the people of the Territories and of all departments ef the Territorial governments. *It may do for the Territories what the people under the Constitution of the United States may do for the States.*"

What is meant by this latter clause which we have italicised? It certainly means that Congress may do for the Territories what the people under the Constitution of the United States may do in framing a constitution for a state government. Of course there is no question but that the right of trial by jury may be entirely done away with by a State constitution. Again in the same case, the court says:

> "The Territories are but political subdivisions of the whole dominion of the United States. Their relation to the general government is much the same as that which counties

> bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations."

In other words that the power of Congress over the Territories is absolute and supreme.

In the case of Benner vs. Porter, 9 How. 235-42, the court says:

> "They are legislative governments and their courts legislative courts. Congress, in the exercise of its power in the organization and government of the Territories, combining the powers of both federal and State authorities."

In the case of Murphy against Ramsay, 114 U. S., 15-44, the court says:

> "The people of the United States as sovereign owners of the national Territories, have supreme power over them and their inhabitants."

See also,

Insurance Co. vs. Canter, 1 Pet. 511, 542.

If Congress could pass the law in question under the provisions of the Seventh Amendment, then it requires no argument to show that the legislature of the Territory could do likewise. If the Seventh Amendment would operate to prevent the passage of such a law in the present Territories, it would operate to prevent the passage of such law in any Territory which the federal government might acquire, and yet it would seem that the framers of the Constitution could not have intended, if the federal government should acquire possession by conquest, or treaty of an island, for instance, peopled by barbarians and there should establish a government for the people and provide for a tribunal composed of one or more judges appointed by the President, who should have jurisdiction to try and determine all cases without the intervention of a jury of twelve of the inhabitants of the island, that such a provision would be opposed to the Seventh Amendment.

Our system of government is somewhat complex, but we take the true rule to be that the legislatures of the Territories under the organic acts usually provided by Congress are endowed with all the powers of the legislatures of the States, subject only to the restraints imposed upon the States by the Constitution of the United States and also the reserved power of Congress to annul or disapprove of their legislation.

If the amendment only applies to United States courts, it is difficult to see how it affects cases in Territorial courts. The Territorial courts are not such courts as are contemplated "within the true meaning" of the Seventh Amendment, any more than suits in the Court of Claims are such suits as are contemplated "within the true meaning" of such amendment. Wherever this court has heretofore intimated that the Seventh Amendment applied in Territorial courts, it has been in cases where the Territorial courts were exercising the jurisdiction of Circuit and District Courts of the United States and not where they were trying causes of local jurisdiction. The Territorial courts exercise a dual jurisdiction; first, a jurisdiction analagous to that exercised by State courts in the class of cases triable by State courts; and, second, by express provision of Congress, the jurisdiction of United States Circuit and District Courts. When exercising the latter jurisdiction, it might well be that the Seventh Amendment would be a restriction upon them.

There are numerous acts of Congress upon the subject of legislation in the Territories, but inasmuch as the assignment of errors and argument of counsel is based wholly upon the Seventh Amendment to the Constitution, we do not deem it necessary to discuss the effect of such legislation.

Third.—The third answer is that, **The Territorial law authorizing a verdict by three-fourths of the jury is not in conflict with the spirit and meaning of the Seventh Amendment.**

Unanimity was not originally required under the common law. It was not until the latter part of the fourteenth century that such requirement became established. Numerous cases are cited where the verdict of a less number was received by the courts prior to that time.

See article on the Jury and its Development, by James B. Thayer, Harvard Law Review, Vol. 5, page 296.

Hess vs. White, 9 Utah, 61.

It may well be doubted under the spirit and genius of a form of government such as ours where the rule of the majority applies almost universally in all its departments, whether it was intended by the Seventh Amendment to preserve this requirement for unanimity which was accepted by a people at a time when rule by the majority was practically unknown among them. A majority of this court is sufficient to render a verdict; a majority of the people of the United States are sufficient to elect its highest officers; a majority of all legislative bodies, ordinarily, is sufficient to pass a law.

In the case of Hurtado v. People, 110 U. S. 516, this court, discussing the phrase "due process of law," said:

> "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail the ideas and processes of civil justice are also not unknown. There is

nothing in the Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and varied experiences of our own situation and system will mold and shape it into new and not less useful forms. * * * Restraints that could be fastened upon executive authority with precision and detail might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and while, in every instance, laws that violated express and specific injunctions and prohibitions might, without embarrassment be judicially declared to be void, yet any general principle or maxim, founded on the essential nature of law, as a just and reasonable expression of the public will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and methods of attainment. Such reglations, to adopt a sentence of Burke's, may alter the mode and application but have no power over the substance of original justice."

The Utah Supreme Court in the case of Hess against White, Supra, after referring to this language, says:

"One of the signs of progress is the provision for a verdict by three-fourths of a jury in a civil cause. Wherever this provision has been tried, it has been found to be a distinct benefit. Such a provision is simply a change in the procedure of applying legal remedies. It is general in its application; it is fair and just to all. No man's property rights are injured by it, and no man can be said to have a vested right in the unanimous action of a jury any more than in the fact that a juror was anciently required to be a freeholder. All litigants could waive in civil trials at common law and under our Constitution this unanimity of verdict. If they conld waive it, then it was not one of the requisites which must be preserved in order to preserve a jury trial in civil actions. For these reasons, because

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society progresses, and modes and legal procedure must change with that progress, because this enactment is a 'just and reasonable expression of the public will,' because it is calculated to be a great benefit to all classes of litigants, because it reaches justly and fairly and impartially all classes of men, because it is claimed only to be an infringement of a broad and general statement in the Constitution which ought not to be so narrowly construed as to be a bulwark against progress, we hold that this law was a rightful subject of legislation, and this judgment should be affirmed."

We therefore insist, if the court should conclude that it has jurisdiction of this appeal, that the decision of the Supreme Court of Utah should be affirmed.

PARLEY L. WILLIAMS,
Attorney for defendants in error.

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Office Supreme Court, U. S.
FILED.
JAN 9 1895
JAMES H. McKENNEY,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

SPRINGVILLE, PLAINTIFF IN ERROR,

vs.

PERRY A. THOMAS AND LAVINIA A. THOMAS,
DEFENDANTS IN ERROR.

BRIEF OF DEFENDANTS IN ERROR IN REPLY.

PARLEY L. WILLIAMS,
Attorney for Defendants in Error.

Star Print, Salt Lake.

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BRIEF OF DEFENDANTS IN ERROR IN REPLY.

The brief of plaintiff in error takes the ground that the authority of the District Court of the Territory to enter judgment on the verdict rendered in pursuance of the Territorial statute providing for a majority verdict, is drawn in question, and that this court has jurisdiction on that ground. This precise phase of the question is not directly discussed in the brief of defendants in error, the question there presented being whether the court has jurisdiction on the ground that the validity of a *Territorial law* is involved.

The position now announced by plaintiff in error is we think, less tenable than the one which is met by our former brief, to-wit: That the court has jurisdiction because the validity of a Territorial law is involved.

In the case of Snow vs. United States, 118 U. S., 353, this court, discussing this precise question, says:

> "The authority exercised by the court in the trial and conviction of the plaintiff in error is not such an 'authority' as is in-

tended by the act. The validity of the existence of the court, and its jurisdiction over the crime named in the indictments, and over the person of the defendant, are not drawn in question. All that is drawn in question is whether there is or is not error in the administration of the statute. The contention of the plaintiff in error would allow a writ of error from this court in every criminal case in a Territory where the prosecution is based upon a statute of the United States; and, indeed, might go still further, for the authority of every court sitting in a Territory is founded on a statute of the United States. From the fact that a given criminal case involves the construction of a statute of the United States, it does not follow that the validity of 'an authority exercised under the United States' is drawn in question. There is a decision of this court on this point in Bethell vs. Demaret, 10 Wall., 537. The 25th section of the Judiciary Act of 1789, allowed a writ of error from this court to the highest court of a state, 'where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of such their validity' The case referred to was a writ of error to the highest court of a state and it was contended that that court, in rendering the decision complained of, acted under the authority of the state; and so there was drawn in question an authority exercised under the state, which, in the particular case, impaired the obligation of a contract, and was repugnant to the Constitution of the United States, and the decision was in favor of the validity of such authority. To this view, this court speaking by Mr. Justice Nelson, gave this answer: 'The authority conferred on a court to hear and determine cases in a State is not the kind of authority referred to in the 25th Section; otherwise, every judgment of the Supreme Court of a State would be re examinable under the section.' "

But after all the real question involved is as to the validity of the Territorial law. The action of the court being based wholly upon this statute, it proceeded under an authority of the Territory of Utah rather than under an authority of the United States.

The case of Clayton against Utah, 132 U. S., 632, is distinguishable from the case at bar.

In deciding that case, this court is careful to limit its right to review the case on appeal to the ground that the validity of an authority of the Governor *expressly conferred upon him* BY THE UNITED STATES under the Organic Act of the Territory, is drawn in question. In addition to the language quoted by plaintiff in error in its brief, we call the court's attention to what is stated at page 638, to-wit:

> "We are therefore very clear that as the Supreme Court of the Territory of Utah based its decision upon the power conferred upon the Governor by the Seventh Section of the Organic Act of Utah to make appointments to office, this power was drawn in question and gives the defendant Clayton a right to have the judgment of this court upon it."

The validity of the Territorial law providing for appointments was also involved in the case but this court took jurisdiction of the appeal, not by reason of, but in spite of this fact, and because of the existence in the case of the question just discussed.

Under the authorities referred to in the former brief of defendants in error, if there had been involved in the Clayton case only a question as to the validity of a Territorial law, this court would undoubtedly have denied the appeal.

PARLEY L. WILLIAMS,
Attorney for Defendants in Error.

166-731

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JAMES H. MCKENNEY
CLERK

IN THE

Supreme Court of the United States.

October Term, 1896.

SPRINGVILLE CITY, *Plaintiff in Error*,

vs.

PERRY A. THOMAS et al. — No. 103.

and

THE AMERICAN PUBLISHING CO., *Plaintiff in Error*,

vs.

A. FISHER BREWING CO. — No. 242.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

Brief in behalf of the American Publishing Company, Plaintiff in Error, in No. 242, Filed by leave of the Court in the case of Springville City vs. Thomas, No. 103 on the present docket of the Court.

By Jeremiah M. Wilson,
For the American Publishing Co.

McGill & Wallace, Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

SPRINGVILLE CITY, Plaintiff in Error, *vs.* PERRY A. THOMAS AND LAVINA THOMAS.	No. 103.
THE AMERICAN PUBLISHING COMPANY, Plaintiff in Error, *vs.* A. FISHER BREWING COMPANY.	No. 242.

In Error to the Supreme Court of the Territory of Utah.

Brief in behalf of the American Publishing Company, filed by leave of the Court in the case of Springville City vs. Perry A. Thomas, No. 103.

Statement.

In the above-entitled case of *Springville City, plaintiff in Error*, v. *Perry A. Thomas et al.*, No. 103, on the docket of the present term of this court, the question is raised as to the constitutionality of the act of the Legislature of the Territory of Utah, approved March 10, 1892,

providing that "in all civil cases a verdict may be rendered on the concurrence therein of nine or more members of the jury." The same question is also raised in the above-entitled case of the *American Publishing Company* v. *A. Fisher Brewing Company*, No. 242.

Representing that company, permission was asked and obtained to file a brief in said case No. 103, because the said question as to the constitutionality of the above-mentioned act of the Legislature of Utah is involved in both cases, and this brief is confined to that question alone. In the case No. 103, however, objection having been made to the jurisdiction of the court therein, we desire, at the outset, to invite attention to the fact that in the case of the American Publishing Company, No. 242, there is no question as to the jurisdiction of this court, since the jurisdictional amount, and more, is involved, and for this reason, irrespective of the question as to the constitutionality of said act, and even if there is not drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, this court has jurisdiction in said case No. 242.

BRIEF.

Reasons for the Adoption of the Seventh Amendment.

In the case now at bar (No. 103), the verdict of the jury, upon which judgment was subsequently entered (as was also the fact in case No. 242), was concurred in by only nine of the jury, three of the members thereof dissenting.

Article 7 of the Amendments to the Constitution of the United States provides as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury *shall* be preserved."

The reasons which led to, and resulted in, the adoption of this amendment are of importance in the consideration of the question now before the court. The Constitution, as originally framed, contained, in the third article thereof, the provision for trial by jury in criminal cases, but omitted to make such a provision with regard to civil cases. Among other criticisms and objections that were made to the Constitution, as originally framed, was one to the effect that it did not contain a clause securing to the people the "enjoyment of the common law," and it was argued that the omission to provide for trials by jury in civil cases was equivalent to an *abolition* of such trials in other than criminal cases.

In No. LXXXIII of the Federalist, Mr. Hamilton undertook to meet this objection, and contended that merely because the trial by jury in civil cases *was not provided for* in the Constitution, such trials were not, for this reason, *abolished*; and he further asserts that Congress could provide for trials by jury in such cases even if nothing was said about it in the Constitution. The distinguished writer says:

"The power to constitute courts is a power to prescribe the mode of trial, and, consequently, if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or let it alone."

This argument, it will be observed, rests upon the proposition that, because the Constitution omitted to provide for trial by jury in civil cases, such trials were not *abolished*, but it was left to the legislature to adopt that mode of trial or not at its discretion. But the "people of the United States," who were making this Constitution for themselves, were not content to leave that matter to the discretion of the legislature, and, therefore, among others, the Seventh Amendment was introduced

at the first session of Congress, was adopted, and thereby the people secured to themselves the right to trial by jury in civil cases beyond the power of legislative interference or abridgment.

And so we are brought to the question—

What constituted Trial by Jury at the time of the adoption of the Seventh Amendment?

At the time of the adoption of the Constitution the jury recognized by the common law consisted of twelve men, and *unanimity* of the twelve was essential to a valid verdict. The expression of the conclusion of the jury at common law imported "*the unanimous decision*, made by the jury, and reported to the court on matters lawfully submitted to them in the course of the trial of a cause" (*Bouvier's Law Dictionary*). When, therefore, the trial by jury was provided for and secured by the Constitution, all that was embraced in a trial by jury at the common law was secured to the people, and one of the essential elements of such a trial was the *unanimous* verdict of the twelve members of the jury.

In the case of *Callan* v. *Wilson* (127 U. S., 549), this court said:

"And, as the guarantee of a trial by jury in the third article (of the Constitution) implied a trial in that mode and according to the settled rules of the common law, the enumeration in the Sixth Amendment of the rights of the accused in criminal prosecutions is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have, in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of these rules, as involving the fundamental rights of life, liberty, and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well as those

permanently or temporarily residing in the District of Columbia as those residing or being in the several States. * * * In *Reynolds* v. *United States* (98 U. S., 145, 154), it was taken for granted that the Sixth Amendment of the Constitution secured to the people of the Territories the right of trial by jury in criminal prosecutions; and it had been previously held in *Webster* v. *Reid* (11 How., 437–460), that *the Seventh Amendment secured to them a like right in civil actions at common law.*"

This court having said, in the opinion from which the above is extracted, that the Sixth Amendment is to be taken as a declaration of the settled rules of the common law with respect to trials by jury in *criminal* cases, we are remitted to the question as to what were the settled rules for such trials in *civil* cases; and we respectfully submit that no rule is or was more thoroughly or universally settled at the common law than the rule that the verdict of a jury must be the *unanimous* expression of the twelve men who composed it.

The Constitution of the United States having used the words "trial by jury" in respect of *both* civil and criminal cases, it matters not whether such trial is a civil or criminal trial; it must be taken to mean precisely the same thing, to wit, a trial by jury *as known and recognized at the common law.* It can not mean one thing in one class of cases and another thing in another class, because, at the common law, there was no difference as to what was required to constitute a valid verdict, namely, the concurrence therein of the minds of the twelve men composing the jury.

In a note to Sharswood's edition of Blackstone's Commentaries, vol. 2, book 3, p. 375, Christian says:

"The unanimity of twelve men, so repugnant to all experience of human conduct, passions, and understandings, could hardly in any age have been introduced into practice by a deliberate act of the Legislature. But that the life, and perhaps the liberty and property of a sub-

ject, should not be affected by the concurring judgment of a less number than twelve, where more were present, was a law founded in reason and caution, and seems to be transmitted to us by the common law, or from immemorial antiquity. The grand assizes might have consisted of more than twelve, yet the verdict must have been given by twelve or more; and if twelve did not agree the assize was afforced—that is, others were added until twelve did concur. (See 1 Reeve's History of English Law, 241, 280.) This was a majority, and not unanimity. A grand jury may consist of any number, from twelve to twenty-three, inclusive, but a presentment ought not to be made by less than twelve. (2 Hale, P. C., 161.) The same is true, also, of an inquisition before the coroner. In the High Court of Parliament and the Court of the Lord High Steward, a peer may be convicted by the greater number; yet there can be no conviction unless the greater number consists at least of twelve. (3 Inst., 30; Kelyng, 56; Moore, 622.) Under a commission of lunacy the jury was seventeen, but twelve joined in the verdict. (7 Ves. Jr., 540.) A jury upon a writ of inquiry may be more than twelve. *In all these cases, if twelve only appeared, it followed as a necessary consequence that to act with effect they must have been unanimous.* Hence, it may be suggested, as a conjecture respecting the origin of the unanimity of juries, that, as less than twelve, if twelve or more were present, could pronounce no effective verdict, *when twelve only were sworn, their unanimity became indispensable.*"

In the 13th volume of the Encyclopædia Britannica (p. 785), in an article on the subject of the jury, by Prof. E. Robertson, is the following:

"The ordinary jury in civil and criminal trials has now been traced down to the point at which its constitution became stereotyped. An important point still wants some historical explanation. The rule requiring a unanimous verdict has been variously accounted for, but Mr. Forsyth's explanation appears conclusive. He regards the rule as intimately connected with the original character of the jury as a body of witnesses, and with the conception common in primitive society that safety is to

be found in the number of witnesses rather than the character of their testimony. The afforcing of the jury above described marks an intermediate stage in the development. Where the jurors were not unanimous, new jurors were added until twelve were found to be of the same opinion. From the unanimous twelve, selected out of a large number, to the unanimous twelve constituting the whole jury, was a natural step, which, however, was not taken without some hesitation. In some old cases we find that the verdict of eleven jurors out of twelve was accepted, *but it was decided in the reign of Edward III that the verdict must be the unanimous opinion of the whole jury.* Diversity of opinion was taken to imply perversity of judgment, and the law sanctioned the application of the harshest methods to produce unanimity. The jurors were not allowed to eat or drink but by leave of the justices, and they might be carried around the circuit in carts until they agreed. These rough enforcements of a unanimous verdict have been softened by later practice, *but the rule itself remains.*"

In a note to section 212, page 210, of Paschal's Annotated Constitution, it is stated:

"By a jury is generally understood to mean *ex vi termini* a trial by a jury of twelve men, impartially selected, in accordance with law, who must *unanimously concur* in the guilt of the accused before a conviction can be had. *Any law, therefore, dispensing with any of these requisites may be considered unconstitutional.* (*Work* v. *State*, 2 Ohio St., 296; *State* v. *Cox*, 3 English, 436; *State* v. *People*, 2 Parker C. C., 322, 329, 402, 562; 2 Leading Cases, 327, and Note.) Story's Constitution, 3d edition, sec. 1779."

In the case of *State* v. *McClear* (11 Nevada, 36–60), the opinion states as follows:

"The terms 'jury' and 'trial by jury' are, and for ages have been, well known in the language of the law. They were used at the adoption of the Constitution, and always, it is believed, before that time, and almost always since, in a single sense.

"The jury for the trial of a cause was a body of twelve men" [describing their qualifications] "sworn to render a true verdict according to the law and the evidence given them, who * * * must return their *unanimous* verdict upon the issue submitted to them.

"All the books of the law describe a trial jury substantially as we have stated it; and a 'trial by jury' is a trial by such a body so constituted and conducted. So far as our knowledge extends, these expressions were used at the adoption of the Constitution, and always before, in these senses alone, by all classes of writers and speakers. (41 N. H., 550.)

"The whole current and drift of the authorities in the United States are, without exception, to the same effect."

In the case of *Lamb et al.* v. *Lane* (4 Ohio St., 177), the opinion states:

"That the term 'jury,' without addition or prefix, imports a body of twelve men in a court of justice, is as well settled as any legal proposition can be." (*Work* v. *State*, 2 Ohio St., 296; *Willyard* v. *Hamilton*, 7 Ohio St. 111.)

A jury *ex vi termini* imports twelve men. (*Turns* v. *Commonwealth*, 6 Metcalf, 231.)

In the opinion of the justices of the Supreme Judicial Court of New Hampshire (41 N. H., 552), it is thus stated:

"We are of opinion that no body of less than twelve men, though they should be by law denominated a jury, would be a jury within the meaning of the Constitution; nor would a trial by such a body, though called a trial by jury, be such within the meaning of that instrument. We think, therefore, that the Legislature has no power to so change the law in relation to juries as to provide that petit juries may be composed of a less number than twelve, nor to provide that a number of the petit jury less than the whole number can render a verdict in any case where the Constitution gives to the party a right to a trial by jury."

In the case of *Bradford* v. *Territory ex rel., &c.* (34 Pac. Rep., 66), the question was presented and decided as to the constitutionality of a law of the Territory of Oklahoma, providing that nine jurors may return a verdict (just as in the case of the act of Utah), and the court unanimously held that such provision was invalid as in violation of the Seventh Amendment to the Constitution of the United States.

It is proper to add that in the case of *Hess et al.* v. *White* (33 Pac. Rep., 243), involving the same question, the Supreme Court of Utah sustained the constitutionality of such a provision.

In the case of *Kleinschmidt* v. *Dunphy* (1 Montana, 118, 131), the act of the Territory of Montana, authorizing a verdict by three-fourths of a jury, was held unconstitutional and void, the court, in its opinion, saying:

"The origin of this mode of trial (by jury) is lost in the dimness of the past, but from the earliest period down to the time of the adoption of the Constitution, *unanimity* of twelve jurors alone, has constituted a legal verdict. If the Legislative Assembly could dispense with one attribute or essential of a verdict, it could as well destroy the others, or repeal the right altogether. It can do neither; and, hence, the act in question is, in so far as it applies to actions at common law in which the value in controversy exceeds $20, unconstitutional and void."

This case of *Kleinschmidt* v. *Dunphy* was afterwards appealed to this court, where it will be found reported in 11 Wallace, 610, 616. The case was, however, here decided upon another point, and this court declined, for that reason, to pass upon the question of the validity of the jury act, saying:

"Without attempting to decide whether the Territorial Legislature had or had not the power to legalize a verdict rendered by three-fourths of a jury, we think the proceedings were erroneous," etc.

It may be conceded that all matters pertaining to the selection of the jury, and not affecting its essential constituents or the essential constituents of a valid verdict, are subject to legislative regulation, but we respectfully submit that, as to all matters that at common law were regarded as essential to the constitution of the jury, or as a part of the institution itself, they are preserved as they existed at the common law, and, therefore, that it was not competent for the Legislature of the Territory of Utah to change these essential and recognized constituents in any respect.

This rule of the common law, so originated and thus firmly established, that the unanimous expression of the twelve men composing the jury is necessary to a valid verdict, was thoroughly known and recognized as an essential part of the common law trial by jury at the time of the adoption of the Constitution; and it was this trial by jury, and it was this rule of the common law, that the people of the United States secured to themselves by the adoption of the Constitution, and the amendments thereto, to which we have referred.

Respectfully submitted.

JEREMIAH M. WILSON,
Attorney for the American Publishing Co.

WASHINGTON, D. C.,
October 31, 1896.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 153.

THE SALT LAKE CITY BREWING COMPANY, PLAINTIFF IN ERROR,

vs.

THE FRED W. WOLF COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED AUGUST 9, 1894.

(15,661.)

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INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from district court	1	1
Complaint	1	1
Exhibit A—Statement	3	2
Summons	3	2
Answer and counter-claim	5	3
Answer to counter-claim	12	7
Amendment to answer	16	9
Verdict	17	10
Judgment	17	10
Bill of exceptions	18	11
Notice of appeal	19	12
Agreement as to record on appeal	19	12
Hearing and submission	20	12
Judgment	20	13
Order fixing amount of bonds	21	13
Opinion	22	13
Writ of error	23	14
Citation	26	15
Proof of service of citation	27	15
Assignment of errors	29	16
Supersedeas bond	32	17
Bond for costs	35	18
Clerk's certificate	38	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 27, 1896.

a In the Supreme Court of Utah Territory.

THE FRED W. WOLF CO., &c., Plaintiff and Respondent,
vs.
SALT LAKE CITY BREWING CO., &c., Defendant and Appellant.

Transcript of Record on Appeal.

Marked: Filed and transmitted Jan. 6th, 1894. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy.

Filed in the supreme court Jan. 6th, 1894, at Salt Lake City, Utah.

JOS. P. BACHE, *Clerk.*

1 In the 3rd Judicial District Court of Utah Territory.

THE FRED W. WOLF COMPANY, a Corporation, Plaintiff,
vs.
THE SALT LAKE CITY BREWING COMPANY, a Corporation, Defendant.

Plaintiff's Complaint.

Now comes the plaintiff above named, and complains of the defendant above named, and for cause of action alleges:

That the plaintiff now is and at all of the times hereinafter mentioned was, a corporation duly organized and existing under the laws of the State of Illinois. And during said time has been doing business in said State of Illinois and other States and Territories. And that the plaintiff transacted business, out of which this case grows, with said defendant as such incorporation.

That as plaintiff is informed and believes, and therefore charges the fact to be, said defendant now is and during all the time hereinafter mentioned was a corporation duly organized and existing under the laws of the Territory of Utah.

2 That said defendant is indebted to the said plaintiff in the sum of thirty-seven hundred and forty-five dollars and sixty-six cents, ($3,745.66) and interest thereon from July 6th, 1891, as a balance for goods, wares and merchandise sold and delivered by said plaintiff to said defendant at defendant's special instance and request, between the 1st day of January, 1891, and the 6th day of July, 1891, which said sum said defendant promised and agreed to pay to this plaintiff. That plaintiff has demanded payment of the same, but that defendant has neglected to pay the same, or any part thereof.

That plaintiff attaches hereto, as an exhibit, a statement of said account, which is hereby referred to and made a part hereof, and marked Exhibit "A."

Wherefore, plaintiff prays judgment against said defendant for said sum of thirty-seven hundred and forty-five dollars and sixty-six cents ($3,745.66) and interest thereon from July 6th, 1891, and costs of suit.

FRANK PIERCE,
Attorney for Plaintiff.

Complaint duly verified.

3 *Statement.*

CHICAGO, *Aug. 22nd*, 1891.

Mess. Salt Lake City Brewing Co., Salt Lake City, Utah, in account with the Fred. W. Wolf Co., manufacturers of the Linde ice machine, 560 North Halsted street.

1891.					
March	2.	To mdse.....	$22 50		
"	18.	" "	278 95		
"	16.	" "	129 24		
"	24.	" expense telegr.....	75		
Apr.	4.	" mdse.....	63 75		
"	1.	" "	6,300 00		
"	16.	" "	54 00		
"	25.	" "	28 50		
July	6.	" "	5 25		
					$6,882 94
		CR.			
M'ch	28.	By cash	$2,950 00		
May	22.	" sundries.....	109 22		
"	30.	" paint'g, M'ch	30 00		
June	30.	" Silver Bros.' bill.....	48 06		
					3,147 28
					$3,745 66

Exhibit "A." Filed Sep. 9, 1891.

Summons.

(Title of Court and Cause.)

The People of the Territory of Utah send greeting to the Salt Lake City Brewing Company, a corporation, defendant:

4 You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the third judicial district of the Territory of Utah, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons—if served on you within this county; or, if served out of this country, but in this district, within twenty days; otherwise within forty days—or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to have judgment against defendant in the sum of $3,745.66, with interest from July 6, 1891, and for costs of suit; alleged to be due upon an account for goods, wares and merchandise, sold and delivered by plaintiff to defendant, at its request, between January 1, 1891, and July 6, 1891, said sum being due and wholly unpaid.

And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will take judgment against you for the sum of $3,745.66, with interest and costs of suit.

Witness, the Hon. Charles S. Zane, judge, and the seal of the district court of the third judicial district, in and for the Territory of Utah, this 3d day of September, in the year of our Lord one thousand eight hundred and ninety-one.

HENRY G. McMILLAN, *Clerk*,
[SEAL.] By GEO. D. LOOMIS, *Deputy Clerk*.

Filed on return Sept. 5, 1891.

5 *Defendant's Answer.*

(Title of Court and Cause.)

The defendant for its answer to the complaint in this action denies that the defendant is indebted to the plaintiff in the sum of thirty-seven hundred and forty-five and $\frac{66}{100}$ ($3,745.66) dollars, or in any sum whatever with or without interest thereon from July 6th, 1891, or any date, as a balance for goods or wares or merchandise sold by plaintiff to defendant between the 1st day of January, 1891, and the 6th day of July, 1891, or at or between any other day or dates, or at all, or that defendant promised or agreed to pay said sum or any part thereof, except as hereinafter modified and set out in the counter-claim hereinafter made by the defendant against the plaintiff. And the defendant denies that the statement of account, Exhibit "A," filed with the complaint, is a true statement of the account of the indebtedness between the plaintiff and defendant, the true statement and condition thereof being fully and correctly stated in the counter-claim of the defendant against the plaintiff, hereinafter set up.

The defendant further answering the complaint, and as and for a counter-claim against the plaintiff, alleges, that for a long time before, and at the dates mentioned in the complaint in this action, the defendant was the owner of and operating a large brewery in Salt Lake City, Utah, and ever since has owned and now operates the same, and by and in which the defendant brewed large quantities of beer, and sold the same upon the market.

That shortly before and at the dates mentioned in the complaint the defendant had enlarged its capacity for brewing more
6 beer, and as a part of such enlargement had constructed additional cellars for cooling and aging beer and preparing same for sale and in that behalf it became necessary for the defendant to supply said brewery with additional refrigerating machinery, with

a refrigerating capacity sufficient to cool or refrigerate the said additional cellars and the beer therein to be stored by defendant in order that it might be kept cool, sweet and pure while aging or ripening, preparatory to placing the same upon the market for sale.

That the plaintiff, having knowledge of these facts, made a proposal in writing to the defendant to conditionally sell to the defendant certain refrigerating machinery for the purpose of cooling and refrigerating said cellar and beer as aforesaid, which proposal was in words and figures following:

And that in pursuance of said proposal the plaintiff and defendant entered into a contract in writing by which the plaintiff conditionally sold to, and defendant conditionally purchased from plaintiff, the machinery described in said proposal and contract for the sum of $6,300, and said contract is in words and figures as follows:

This agreement, made and entered into this 17th day of January, at Chicago, by and between the Fred W. Wolf Company, a corporation, organized under the laws of the State of Illinois, and having its principal place of business in the city of Chicago, county of Cook, and State of Illinois, party of the first part, and the Salt Lake City Brewing Company, a corporation existing under the laws of the Territory of Utah, and having its principal place of business in the city of Salt Lake City, Utah, party of the second part, witnesseth:

That the said party of the first part has agreed to furnish to said party of the second part free on board cars in Chicago of the best material and workmanship, one double-acting Linde refrigerating machine of size No. 5, together with crank, shaft and fly-wheel. The shaft to be eight inches diameter, wheel ten feet diameter and fifteen inch face. One outboard pillow block for the outer end of the crank shaft. One counter-shaft three and a half inches diameter, having four hangers, and one main driving pulley forty-six inches diameter, and one friction-clutch pulley, forty-eight inches diameter. These pulleys to be both wide enough for a fourteen-inch belt. The belt to be furnished by said party of the second part.

7

The said party of the first part also to furnish one open condensor of sufficient size for the No. 5 Linde machine (containing about one thousand feet of two-inch pipe) put in under this contract.

The expansion piping needed for one cellar 68 x 38 and the necessary valves to connect the ammonia piping to the existing baudelot. The direct-expansion piping will be provided with the Wolf patent disks, or radiators, twelve inches apart throughout the entire length of the expanding pipe. All ammonia connections necessary to connect the compressor to the condensor and to the direct-expansion pipe in the cellar will be furnished by party of the first part.

It is understood that all the necessary ammonia connections are included. The said party of the first part also furnishes the necessary charge of ammonia.

And it is understood and agreed that the above plant is to be delivered on cars in Chicago not later than March 1st, 1891. And

said party of the first part further guarantees that the power to drive the compressor while doing the above work shall not exceed twenty-two effective horse-power at sixty revolutions per minute with condensor water at sixty degrees Fahrenheit.

And that the loss of ammonia shall not exceed one hundred dollars ($100) per year, excepting losses which may be caused by
8 the carelessness of the employees of said party of the second part. And said party of the first part also guarantees that this compressor shall be double-acting and of the same size and description as the one now in existence in your brewery and shall be equal to same in every respect.

And it is understood that the property rights in the plant shall remain in said party of the first part until the purchase price shall have been fully paid in cash.

And in consideration of the above guarantees and agreements the said party of the second part hereby agrees to well and truly pay or cause to be paid to said party of the first part the full sum of fifty-nine hundred dollars (5,900.00) lawful money of the United States, in the following manner:

Three thousand dollars ($3,000.00) upon notice of shipment of the machinery.

Twenty-nine hundred dollars ($2,900.00) sixty days after shipment of the machinery.

In witness whereof, the said parties have hereunto set their hands and affixed their seals this day and year first above written.

THE FRED W. WOOLF CO.,

[SEAL.] By F. W. PILSBRY, *M'g'r.*

That afterwards and before the delivery of said machinery by plaintiff and the acceptance thereof by defendant, said contract was modified to the extent, that the plaintiff was to and did attach to the engine of said machine a coupler, for which the plaintiff increased the price of said machinery in the sum of $400, making the total purchase price thereof $6,300.

9 That said machinery reached the defendant's said brewery on to wit: the 8th day of April, 1891, and by to wit: the 17th day of May, 1891, was placed in position and considered ready for operation in said brewery, and on that day started up for a test and a run, the agent of the plaintiff being present and aiding and directing the placing of said machinery in position for operation, and starting the same, and thence until to wit, the 4th day of July, 1891, the said machinery proved defective in its operation, in that the fly-wheel was not true, and the flanges which bound the condensor together were weak and inferior and not strong enough to hold said condensor together when in operation, and day after day the flanges broke and rendered said machinery useless from said 17th day of May to said 4th day of July, and so continued useless until other flanges of a stronger kind were used in the place of those that were broken as aforesaid, and by use of 48 strong iron bands placed at as many different places thereon said condensor was bound and held together, and said machinery thereby enabled to be operated to the

extent that said cellar could be cooled and used for the purpose aforesaid of keeping cool and ripening beer, and for the purpose of which said machinery was intended.

That the said machine mentioned in said proposal then in use by the defendant at its said brewery was perfect, and did good work and met all the requirements of refrigeration and purposes for which it was intended and did cool and refrigerate the cellar in defendant's said brewery used in connection therewith before said other cellars were made and kept the beer stored therein cool and pure, and the same ripened in good condition for the market; and also the fly-wheel thereof was true and turned and smooth.

10 That in and by said contract that plaintiff agreed that said machine, viz., "one double-action Linde refrigerating machine of size No. 5, together with crank and fly-wheel," should be of the best material and workmanship, and that the condensor to be furnished under said contract and used with said machine should be equal in every respect to the condensor then in use by the defendant in said brewing.

That defendant has complied with the terms of said contract on its part, but that the plaintiff has not, but has violated the same, in this, to wit, that said machine was not of the best material and workmanship, in that the fly-wheel was not true, and the same is not turned, but is rough, and the outer part or surface, upon which the belt is run, is broken and patched, and that the flanges on the condensor were and are weak and not strong enough to hold the condensor together when in operation, and the flanges would and did break when the condensor was being operated, and continued so to break from said 17th day of May until said 4th day of July and until by them the same had been temporarily banded together, as aforesaid, by said iron bands, and that the said compressor was in no way equal in value or action to the compressor then in use and used by the defendant in its said brewery, in that there were and there are holes in the same, and that the same did leak and permit am-onia to escape therefrom of the value of more than $100 per year.

That said machine and condensor are not of the value nor were they of the value of more than $2,950; that on, to wit, said 17th day of May the defendant had brewed 100 barrels of beer, preparatory to putting the same in said cellar, to be used in connec-

11 tion with said machine and condensor mentioned in the contract, but by reason of the failure of said machine and said condensor to work and cool and refrigerate said cellar, in that said beer could and would be kept cool, sweet, and ripen for market, the same became sour, spoiled, worthless, and of no value, and the same was a total loss to defendant, and that said beer so soured, had the same not been so soured and spoiled, was of the value of $600.

That on and from the 17th day of May, the defendant was ready and able, except for the deficiencies and failure of said machinery, furnished under said contract to brew, and would have brewed 270 barrels of beer per day at its brewery each day thereafter, but by

reason of the defects in said machinery, and its failure to work as aforesaid, the defendant did not, and could not brew any beer on the 18th and 19th days of May and 1st day of June, 1891, and did and could brew only on the following days thereafter the following number of barrels of beer, viz: May 20th, 21st and 22d, 1891, brewed 180 barrels each; 23d, 25th, 26th, 27th, 28th, 29th and 30th, brewed 90 barrels each; June 2d, 1891, brewed 180 barrels; June 3d, 4th, 6th, 8th and 9th, brewed 90 barrels each; June 10th, brewed 180 barrels; June 11th, 12th, 13th, 15th, 16th, 17th, 18th, 19th, 20th, 22d, 23d and 24th, brewed 90 barrels each; making a total loss of 5,580 barrels of beer which could and would have been brewed and sold by the defendant at a net profit of $2.00 per barrel, making a loss and damage to the defendant in the sum of $11,160.00.

That by reason of the failures as aforesaid of the plaintiff to perform said contract as aforesaid, the defendant has been damaged in the sum of $20,485.

That all the items of charges and credits mentioned in the Exhibit "A" attached to the complaint are correct, except that the item "April 1st, 1891, to mdse. $6,300.00, and the credit." March 28th, by cash $2,950.00 is incorrect, as the charge $6,300.00 was the price of said machinery so conditionally sold as aforesaid, and the
12 credit $2,950.00 was a partial payment thereon under said contract, the balance of the other items are correct, both as to debits and credits, leaving a balance on account of $395.66 due by defendant to plaintiff except for the counter-claims aforesaid of defendant against the plaintiff.

Wherefore defendant demands judgment against the plaintiff for the sum of $20,485, and that defendant having paid plaintiff as much as said machinery is or was worth, that the defendant be adjudged the owner thereof or if not so adjudged, then that a judgment against plaintiff and in favor of the defendant for the sum of $2,950.00 paid thereon in addition to the $11,860.00, making a total of $14,810.00, upon said counter-claim, and the plaintiff a credit of $395.66, leaving a balance of $14,414.34 in favor of the defendant against the plaintiff, for all general and proper relief and for costs of suit.

W. C. HALL,
Attorney for Defendant.

Answer duly verified.
Filed Sep. 30, 1891.

Answer to Counter-claim.

(Title of Court and Cause.)

Now comes the plaintiff above named and for its answer to defendant's counter-claim:

13 Denies that any agent of plaintiff was present or aided or directed the placing of said machinery in position for operation, or aided or directed in starting the same on said 17th day of May, 1891, or at any other time, and denies that between the 17th

day of May, 1891, and the 4th day of July, 1891, or at any other time, the said machinery proved defective in its operation, or that the fly-wheel was not true, or that the flanges which bound*ed* said condens*or* together were weak or inferior or were not strong enough to hold said condens*or* together when in operation or at all, and denies for want of information or belief that said flanges broke from day to day or rendered said machine useless from said 17th day of May, 1891, to said 4th day of July, 1891, or at all, or continued useless until other flanges of a stronger kind or material were used, or that by the use of forty-eight strong iron bands said condens*or* was held together, or that said machinery was thereby enabled to be operated or that said iron bands or any of them were necessary for the proper operation of said machinery.

This plaintiff has no information or belief sufficient to enable him to answer, and therefore denies that the machinery mentioned in said proposal then in use by said defendant at its brewery was perfect or did good work or met all the requirements for which it was intended, or cooled or refrigerated the cellar in defendant's brewery in connection therewith, or kept the beer stored therein cool or pure or that the same ripened in good condition, or that the fly-wheel thereof was true or turned or smooth.

14 Plaintiff denies that the condens*or* to be furnished under said contract was to be equal in every respect to the condens*or* then in use by defendant in its said brewery.

Denies that the plaintiff has violated said contract in any respect or that said machine was not of the best material or workmanship or that the fly-wheel was not true or is rough or unturned or that the outer part or surface upon which the belt is run is broken or patched or that said condens*or* is not equal in value, use or action to the condens*or* then in use by the defendant as aforesaid, or that flanges on said condens*or* are weak or not strong enough to hold the condens*or* together when in use, and denies for want of information and belief that said flanges did break when the condens*or* was in operation, or did continue to break from said seventeenth day of May, 1891, until the fourth day of July, 1891, or at any other time.

Denies that said machinery and condens*or* are not or never were of a value to exceed twenty-nine hundred and fifty ($2,950) dollars, but alleges that the same were worth the amount charged as set forth in said plaintiff's complaint.

This plaintiff has no information or belief sufficient to enable him to answer and therefore denies that, on the seventeenth day of May, 1891, by reason of the failure of said machinery or said condens*or* to work or cool or refrigerate said cellar 100 barrels of beer became spoiled and worthless or that the same or any part thereof was a total loss or any loss to said defendant or that said beer became soured or that the same could have been sold for six hundred ($600) dollars or any sum or amount whatever or that any beer was sour or spoiled by reason of any of the defects in the machinery so furnished by said plaintiff to defendant as aforesaid.

15 Plaintiff has no information or belief sufficient to enable him to answer he therefore denies that on said seventeenth day of May, 1891, the defendant was ready or able except for the deficiencies or failure in said machinery to brew or would have brewed 270 barrels of beer per day each day thereafter, or that by reason of the defects in said machinery or its failure to work as aforesaid, the defendant did not or could not brew any beer on the 18th or 19th days of May, or the first day of June, or did or could brew on May 20th, 21st, or 22d, 1891, only 180 barrels of beer each day, or that on the 23d, 25th, 26th, 27th, 28th, 29th, and 30th days of May, said defendant brewed only 90 barrels of beer per day; or that on June 2nd, defendant brewed only 180 barrels of beer, or that on June 3d, 4th, 6th, 8th, 9th, only ninety barrels of beer each day; or that on June 10th, defendant brewed only one hundred and eighty barrels of beer; or that on June 11th, 12th, 13th, 15th, 16th, 17th, 18th, 19th, 20th, 22d, 23d or 24th said defendants brewed 90 barrels of beer only on each day, or that by reason of any failure or defect in said machinery defendant lost 5,580 barrels of beer, or that the same could and would have been sold at a net profit of two ($2) dollars per barrel.

Or that said defendant by reason of any of the acts of this plaintiff or any of the defects in said machinery was damaged or lost the sum of eleven thousand one hundred and sixty ($11,160) dollars, or any other sum or amount whatever, or that there were any defects in said machinery.

Further answering, this defendant alleges:

That the machinery and every part thereof furnished as aforesaid, was fully up to the requirements of said contract, and that
16 the material used in the construction of said machinery and the whole thereof, was the best, and the workmanship placed thereon was first-class in every particular.

That on or about the 27th day of May, 1891, said defendant corporation received and accepted said machinery and promised to pay the claim of plaintiff for the same as set out in plaintiff's original complaint herein.

Wherefore, plaintiff prays judgment that defendant take nothing by its counter-claim but that plaintiff have judgment against said defendant as prayed for in the original complaint herein.

FRANK PIERCE,
Attorney for Plaintiff.

Duly verified.
Filed 23d day of February, 1893.

Amendment to Answer.

(Title of Court and Cause.)

Now comes the defendant above named and by leave of the court first had and obtained, amends its answer as to the counter-claim in the above-entitled action, by inserting after the words and figures following "value of $600," page 12, line last, the following: "That

of the beer brewed by said defendant and placed in said cooling cellar to age and rest and ripen, between the 17th day of May, 1891, and the 4th day of July, 1891, 1,725 barrels thereof, of the value of five dollars per barrel, aggregating $8,625 in value were spoiled and rendered utterly valueless by reason of the said defects in said condensor; that is to say, by reason of the breaking of said flanges thereon which rendered it impossible during said period to keep or maintain the temperature of said cooling cellar at the proper and requisite degree for the preservation of beer placed therein to age, rest and ripen, whereby said defendant was damaged in the further sum of $8,625.00."

W. H. DICKSON,
W. C. HALL,
Attorneys for Defendant.

Amendment to answer duly verified.
Filed Oct. 17, 1893.

17 *Verdict.*

(Title of Court and Cause.)

We, the jurors impaneled in the above case, find the issues for the plaintiff and assess its damages at the sum of $2,500. Twenty-five hundred dollars in full of all demands.

Dated Oct. 20, 1893.

F. M. BISHOP, *Foreman.*

Filed Oct. 21, 1893.

Judgment on Verdict.

(Title of Court and Cause.)

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names, and say they find a verdict for the plaintiff as follows, to wit: We, the jurors impaneled in the above case, find the issues for the plaintiff and assess its damages at the sum of $2,500. Twenty-five hundred dollars in full of all demands.

F. M. BISHOP, *Foreman.*

Dated Oct. 20, 1893.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said plaintiff have and recover from said defendant the sum of twenty-five hundred dollars, with interest thereon at the rate of eight per cent. per annum from the date hereof, till paid, together with said plaintiff's costs

and disbursements incurred in this action, amounting to the sum of one hundred and seventeen and $\frac{40}{100}$ dollars.

Judgment entered October 21, A. D. 1893.

Filed Oct. 21, 1893.

18 *Bill of Exceptions.*

(Title of Court and Cause.)

Be it remembered, that in the above-entitled action the following proceedings were had, viz:

On the 20th day of October, 1893, the evidence in said action having all been offered and received before the court and the jury, and thereupon the court, after argument by counsel, instructed the jury and submitted the cause to them for their verdict, and that afterwards, to wit, on the 21st day of October, 1893, the jury came into court and stated that they had agreed upon a verdict in said action, and whereupon the names of the jurors were called by the clerk of the court, and answered as to whether or not they had agreed upon a verdict in said action, and upon such call, nine of the jurors answered in the affirmative, and three of the jurors answered in the negative, showing that only nine of the jurors had agreed upon the verdict in favor of the plaintiff, and that the defendant, by its attorneys, then and there objected to the said verdict, and that it be not received by the court and entered of record as the verdict of the jury in said action, because the same was not unanimous, not found by all the jurors, which objection was overruled by the court, and to which ruling the defendant then and there excepted.

And whereas, said action of said jurors in rendering their verdict as aforesaid, the objections thereto by the defendant, and the action of the court upon such objection and exception to such ruling of the court by the defendant, and such proceedings not appearing of record in said action; and whereas defendant is desirous of incorporating the same into the record of this action by a bill of exceptions; and whereas the same appear to be matters notably to be placed in a bill of exceptions:

Now, therefore, I, G. W. Bartch, judge of said court, upon this 17th day of November, 1893, have, upon motion of the attorneys for the defendant, signed and sealed the foregoing as and for the defendant's bill of exceptions in said action.

[SEAL.] G. W. BARTCH, *Judge.*

Dated November 17, 1893.

Attest: HENRY G. McMILLAN, *Clerk.*

Filed November 17th, 1893.

19 *Notice of Appeal.*

(Title of Court and Cause.)

Take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the Territory of Utah, from the judgment rendered in the above-entitled action on the 21st day of October, 1893, in favor — the plaintiff in said action, and against the defendant in said action, and from the whole of said judgment.

W. H. DICKSON,
W. C. HALL,
Attorneys for Defendant.

Dated December 7th, 1894.

To Frank Pierce, attorney for plaintiff and to the clerk of said court.

Service admitted seventh day of December, 1893.

FRANK PIERCE,
Attorney for Plaintiff.

Filed Dec. 7, 1893.

Certificate of Transcript on Appeal by the Attorneys.

(Title of Court and Cause.)

It is hereby agreed that the foregoing transcript contains a full, true and correct copy of all papers necessary and proper to be used on the appeal; that the appeal herein was duly perfected and requisite undertaking on appeal was given and filed within the time prescribed by law; that the foregoing is a full, true and correct transcript, and that the appeal herein may be heard thereon.

W. H. DICKSON,
W. C. HALL,
Attorney for Appellant.
FRANK PIERCE,
Attorney for Respondent.

Dated Jan'y 6th, 1894.

20 In the Supreme Court of Utah Territory, Regular June Term, 1894.

TUESDAY, *June* 12.

THE FRED. W. WOLF COMPANY *vs.* THE SALT LAKE CITY BREWING COMPANY, Appellant. } Appeal from 3rd District.

This cause coming on regularly for hearing was argued by W. E. Hall, Esq., for appellant; was submitted and taken under advisement.

Title of Court and Cause.

WEDNESDAY, *June* 13.

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed with costs.

21 Title of Court and Cause.

WEDNESDAY, *June* 20.

On motion of counsel for appellant, it is ordered that the amount of a supersedeas bond to be given on writ of error, removing this cause to the Supreme Court of the United States, be, and the same is hereby, fixed in the sum of six thousand (6,000) dollars, and the bond for costs to be given thereon is fixed in the sum of five hundred (500) dollars.

22 In the Supreme Court of Utah Territory.

THE FRED. W. WOLF COMPANY, a Corporation, Respondents,
vs.
THE SALT LAKE CITY BREWING COMPANY, a Corporation, Appellant.

MERRITT, *C. J.:*

The appellant's only point for setting aside the verdict and for reversal of the judgment in this case is that the verdict of the jury was concurred in by only nine of the jurors.

The record presents only this question: "Can nine concurring jurors render a verdict?"

The legislature of Utah, on March 10th, 1892, amended the jury law and provid*ing* that "in all civil cases a verdict may be rendered on the concurrence of nine or more members of the jury."

This statute has been held valid by this court in the case of Hess *et al. vs.* White.

33 Pacific Rep., 243.

And also by this court at its present term in the cases of The American Publishing Co. *vs.* Fisher and Tucker *vs.* Salt Lake City.

There being no other error assigned, the judgment of the court below is affirmed.

We concur.
MINER, *J.*
SMITH, *J.*

Marked: Filed Jun- 13th, 1894

23 In the Supreme Court of the Territory of Utah.

THE SALT LAKE CITY BREWING COMPANY, a Corporation, Plaintiff in Error,
vs.
THE FRED W. WOLF COMPANY, a Corporation, Defendant in Error.
} Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said supreme court, before you, between The Fred W. Wolf Company, the plaintiff and respondent, and The Salt Lake City Brewing Company, defendant and appellant, a manifest error hath appeared, to the great damage of the said The Salt Lake City Brewing Company, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, *we* command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at Washington, together with this writ, so that you have the same at Washington, D. C., within sixty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to law and custom of the United States should be done.

24 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of June, in the year of our Lord one thousand eight hundred and ninety-four.

[Seal Supreme Court, Territory of Utah, United States of America.]

JOSEPH P. BACHE,
Clerk of the Supreme Court of Utah Territory.

25 [Endorsed:] Supreme court of Utah. The Salt Lake City Brewing Co. *vs.* The Fred W. Wolf Co. Writ of error. Filed in the supreme court & copy lodged with me Jun- 25, 1894, at Salt Lake City, Utah. Jos. P. Bache, clerk.

26 In the Supreme Court of Utah Territory.

THE SALT LAKE CITY BREWING COMPANY, a Corporation, Plaintiff in Error,
vs.
THE FRED W. WOLF COMPANY, a Corporation, Defendant in Error.
} Citation.

By the Honorable Samuel A. Merritt, chief justice of the supreme court of Utah Territory, to The Fred W. Wolf Company, a corporation, and to Frank Pierce, its attorney:

You are hereby notified and admonished to be and appear at a Supreme Court of the United States, within sixty days from the date hereof, pursuant to a writ of error filed with the clerk of the supreme court of Utah, wherein The Salt Lake City Brewing Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel A. Merritt, chief justice of the supreme court of Utah Territory, the 25th day of June, in the year of our Lord one thousand eight hundred and ninety-four.

[Seal Supreme Court, Territory of Utah, United States of America.]

SAM'L A. MERRITT,
Chief Justice of the Supreme Court of Utah Territory.

Attest: JOSEPH P. BACHE,
Clerk Supreme Court of Utah Territory.

27 *Service of Citation.*

UNITED STATES OF AMERICA,
Territory of Utah,
} *ss:*

On the 25th day of June, A. D. 1894, personally appeared John B. Cummock, deputy U. S. marshal for Utah Territory, before me, a subscribed clerk of the supreme court of the Territory of Utah, and makes oath that he delivered a true copy of the within citation to Frank Pierce, the attorney for the within-named defendant in error, at his office, Salt Lake City, Utah Territory, on this 25th day of June, A. D. 1894.

JOHN B. CUMMOCK.

Subscribed and sworn to before me this 25th day of June, A. D. 1894.

[Seal Supreme Court, Territory of Utah, United States of America]

JOSEPH P. BACHE,
Clerk of the Supreme Court of Utah Territory.

28 [Endorsed:] Supreme court of Utah. The Salt Lake City Brewing Co. *vs.* The Fred W. Wolf Co. Citation and service. Filed in the supreme court Jun- 25, 1894, at Salt Lake City, Utah. Jos. P. Bache, clerk.

29 In the Supreme Court of the United States.

THE SALT LAKE CITY BREWING COMPANY, a Corporation, Plaintiff in Error, *vs.* THE FRED W. WOLF COMPANY, a Corporation, Defendant in Error. } Assignment of Error and Prayer for Reversal.

Said plaintiff in error makes the following assignment of error, to wit:

That only nine of the jurors constituting a jury concluded in or agreed upon the verdict in the action—that is, when the jury came into court and stated that they had agreed upon a verdict, and thereupon the names of the jurors were called by the clerk of the court and answered as to whether or not they had agreed upon the verdict, and upon such call nine of the jurors answered in the affirmative and three of the jurors answered in the negative, showing that only nine of the jurors had agreed upon the verdict in favor of the defendant in error, and that the plaintiff in error then and there, in open court, objected to the verdict and that it not be received by the court and entered as the verdict of the jury, because the same was not unanimously found by the jury, which objection was by the court overruled, and to which ruling the plaintiff in error then and there excepted, all of which will appear by reference to the bill of exceptions signed, sealed, and delivered by the judge at the trial of this action.

Wherefore, in consideration of said error, the plaintiff in error prays this court for a reversal of said judgment and decision of said supreme court of Utah Territory, and that said cause be re-
30 manded with a direction that such further action and proceedings be taken therein as may be in accordance with the law.

JOHN A. MARSHALL,
W. C. HALL,
Attorneys for Plaintiff in Error.

31 [Endorsed:] Supreme court. The Salt Lake City Brewing Co. *vs.* The Fred W. Wolf Co. Assignment of error. Filed in the supreme court Jun- 25, 1894, at Salt Lake City, Utah. Jos. P. Bache, clerk.

32 In the Supreme Court of Utah Territory.

THE SALT LAKE CITY BREWING COMPANY, Plaintiff in Error,
vs.
THE FRED W. WOLF COMPANY, Defendant in Error.

Bond on Removal of Cause to the Supreme Court of the United States.

Know all men by these presents that we, The Salt Lake City Brewing Company, as principal, and Matthew Cullen and Jacob Moritz, as sureties, of the city and county of Salt Lake, Territory of Utah, are held and firmly bound unto The Fred W. Wolf Company (the defendant in error) in the full and just sum of six thousand five hundred dollars, lawful money of the United States of America, to be paid to the said The Fred W. Wolf Company, its certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the 22nd day of June, A. D. 1894.

Whereas lately, at a supreme court of the Territory of Utah, in a suit pending in said court between the said The Fred W. Wolf Company, as respondent, and the said The Salt Lake City Brewing Company, as appellant, judgment was rendered against the said appellant, said The Salt Lake City Brewing Company, and the said appellant, said The Salt Lake City Brewing Company, having obtained a writ of error and filed a copy thereof in the clerk's
33 office of said supreme court of said Territory to reverse the said judgment in the aforesaid action, and a citation directed to said respondent, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., the second Monday of October next, and said supreme court of said Territory of Utah, at said session, having fixed a bond for sixty-five hundred dollars on said writ of error, being six thousand on the judgment and five hundred dollars for cost of said writ:

Now, the condition of the above obligation is such that if the said appellant, said The Salt Lake City Brewing Company, shall prosecute said writ of error to effect and answer all damages and costs if the said appellant, said The Salt Lake City Brewing Company, fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE SALT LAKE CITY BREWING COMPANY,
By MATTHEW CULLEN, *Its President.*
JACOB A. MORITZ. [SEAL.]
MATTHEW CULLEN. [SEAL.]

Signed, sealed, and delivered in the presence of—
WM. C. HALL.

Approved June 25th, 1894, by—
SAM'L A. MERRITT,
Chief Justice of the Supreme Court of Utah Territory.

3—153

34 TERRITORY OF UTAH, } ss:
Salt Lake County, }

Matthew Cullen and Jacob Moritz, first being duly sworn, each deposes and says that he is a freeholder in the county of Salt Lake, in Utah Territory; that he is worth the sum of sixty-five hundred dollars over and above all his debts and liabilities, exclusive of property exempt from execution.

JACOB MORITZ.
MATTHEW CULLEN.

Subscribed and sworn to before me the 22nd day of June, 1894.

JOSEPH T. RICHARDS,
Notary Public.

Marked: Filed in the supreme court Jun- 25th, 1894, at Salt Lake City, Utah. Jos. P. Bache, clerk.

35 In the Supreme Court of Utah Territory.

THE SALT LAKE CITY BREWING COMPANY, a Corporation, Plaintiff in Error,
vs.
THE FRED W. WOLF COMPANY, a Corporation, Defendant in Error.

Bond for Costs on Removal of Cause to the Supreme Court of the United States.

Know all men by these presents that we, The Salt Lake City Brewing Company, as principal, and Matthew Cullen and Jacob Moritz, of the city and county of Salt Lake, Territory of Utah, as sureties, are held and firmly bound unto The Fred W. Wolf Company, a corporation, in the full sum of five hundred dollars, lawful money of the United States of America, to be paid to the said The Fred W. Wolf Company, its certain attorneys, successors, and assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, heirs, administrators, and executors, jointly and severally, by these presents.

Sealed with our seals and dated this 22nd day of June, A. D. 1894.

Whereas lately, in session of the supreme court in the Territory of Utah, in a suit pending in the said court between The Fred W. Wolf Company, as respondent, and the said Salt Lake City Brewing Company, as appellant, judgment was rendered against the appellant, said Salt Lake City Brewing Company, and the said appellant, said Salt Lake City Brewing Company, having obtained
36 a writ of error and filed a copy thereof in the clerk's office of said supreme court of said Territory of Utah and reversed said judgment in the aforesaid action, and a citation directed to said respondent, citing and admonishing it to be and appear before the Supreme Court of the United States, to be holden at Washington, D. C., within 60 days from date of said citation, and the said supreme court in the Territory of Utah at said session having fixed a

bond for cost of said writ of error in the sum of five hundred dollars:

Now, the condition of the above obligation is such that if the said appellant, The Salt Lake City Brewing Company, shall prosecute said writ of error to effect and answer all damages and costs if the said appellant, said The Salt Lake City Brewing Company, fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THE SALT LAKE CITY BREWING COMPANY,
By MATTHEW CULLEN, *Its President.*
JACOB MORITZ. [SEAL.]
MATTHEW CULLEN. [SEAL.]

Signed, sealed, and delivered in the presence of—
WM. C. HALL.

Approved June 25th, 1894, by—
SAM'L A. MERRITT,
Chief Justice of the Supreme Court of Utah Territory.

37 TERRITORY OF UTAH, } ss:
Salt Lake County, }

Matthew Cullen and Jacob Moritz, first being duly sworn, each deposes and says that he is a freeholder in the county of Salt Lake, in Utah Territory; that he is worth the sum of five hundred dollars over and above all his debts and liabilities, exclusive of property exempt from execution.

JACOB MORITZ.
MATTHEW CULLEN.

Subscribed and sworn to before me the 22nd day of June 1894.
JOSEPH T. RICHARDS,
Notary Public.

Marked: Filed in the supreme court Jun- 25th, 1894, at Salt Lake City, Utah. Jos. P. Bache, clerk.

38 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I, Joseph P. Bache, clerk of the supreme court of said Territory of Utah, in pursuance of the attached writ of error, do return, annexed hereto and to said writ, the original citation, a transcript of the record, the proceedings, opinion, assignment of errors, supersedeas bond, all in and of said court, in the cause in said writ described, to the Supreme Court of the United States; and I hereby certify that said annexed transcript of said record, proceedings, opinion, assignment of errors, and bond is a full, true, and correct and complete copy of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand and the seal of said supreme court of Utah Territory this 25th day of July, A. D. 1894, at Salt Lake City.

[Seal Supreme Court, Territory of Utah, United States of America.]

JOSEPH P. BACHE,
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Case No. 15,661. Utah Territory supreme court. Term No., 153. The Salt Lake City Brewing Company, plaintiff in error, *vs.* The Fred W. Wolf Company. Filed August 9th, 1894.